DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-559
Title: John Doe #1, et al., Petitioners
v.
Sam Reed, Washington Secretary of State, et al.
Docketed: November 6, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-35818, 09-35826, 09-35863)
Decision Date: October 15, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 16 2009	Application (09A356) to vacate the stay issued by the United States Court of Appeals for the Ninth Circuit on October 15, 2009, in case Nos. 09-35818, 09-35826 & 09-35863, submitted to Justice Kennedy.
Oct 16 2009	Response to application (09A356) requested by Justice Kennedy, due Monday, October 19, 2009, by 3 p.m. EDT.
Oct 19 2009	IT IS ORDERED that the order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, issued October 15, 2009, which stayed the district court 's order granting a preliminary injunction, is hereby stayed. The September 10, 2009, order of the United States District Court for the Western District of Washington, case No. C09-5456BHS, therefore remains in effect pending further order of Justice Kennedy or of this Court.
Oct 19 2009	Response to application from respondent Sam Reed, Washington Secretary of State, et al. filed.
Oct 20 2009	Application (09A356) referred to the Court.
Oct 20 2009	The application presented to Justice Kennedy and by him referred to the Court is granted. The order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, entered October 15, 2009, is hereby stayed. The September 10, 2009 order of the United States District Court for the Western District of Washington, case No. C09-5456BHS, granting the motion for preliminary injunction shall remain in effect pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Stevens would deny the application.
Nov 5 2009	Petition for a writ of certiorari filed. (Response due December 7, 2009)
Dec 7 2009	Brief of respondent Washington Families Standing Together in opposition filed.

Dec 7 2009	Waiver of right of respondent Washington Coalition for Open Government to respond filed.
Dec 7 2009	Brief of respondent Secretary of State Sam Reed in opposition filed.
Dec 16 2009	Reply of petitioners John Doe #1, et al. filed.
Dec 23 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 15 2010	Petition GRANTED. The brief of petitioners is to be filed on or before Thursday, February 25, 2010. The brief of respondents is to be filed on or before Thursday, March 25, 2010. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 16 2010	SET FOR ARGUMENT ON Wednesday, April 28, 2010.
Feb 23 2010	Brief amici curiae of Common Sense for Oregon, et al. filed.
Feb 25 2010	Brief of petitioners John Doe #1, et al. filed.
Feb 25 2010	Joint appendix filed. (Statement of costs filed)
Mar 1 2010	Brief amicus curiae of Justice and Freedom Fund filed.
Mar 3 2010	Brief amicus curiae of Concerned Women for America filed.
Mar 4 2010	Brief amicus curiae of American Center for Law and Justice filed.
Mar 4 2010	Brief amici curiae of Electronic Privacy Information Center, et al. filed.
Mar 4 2010	Motion for leave to file amicus brief filed by Center for Constitutional Jurisprudence.
Mar 4 2010	Brief amicus curiae of Voters Want More Choices filed.
Mar 4 2010	Brief amicus curiae of Liberty Counsel filed.
Mar 4 2010	Brief amici curiae of Brennan Center for Justice, et al. filed.
Mar 4 2010	Brief amicus curiae of Institute for Justice filed.
Mar 4 2010	Brief amicus curiae of ProtectMarriage.com filed.
Mar 4 2010	Brief amicus curiae of Cato Institute filed.
Mar 4 2010	Brief amicus curiae of Center for Competitive Politics filed.
Mar 4 2010	Brief amici curiae of Free Speech Defense and Education Fund, Inc., et al. filed.
Mar 4 2010	Brief amici curiae of Committee for Truth in Politics, et al. filed.
Mar 4 2010	Brief amicus curiae of American Civil Rights Union filed.
Mar 4 2010	Brief amicus curiae of Alliance Defense Fund filed.
Mar 8 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Mar 8 2010	Record from U.S.D.C. for Western District of Washington (Seattle) is electronic.
Mar 18 2010	CIRCULATED.
Mar 25 2010	Brief of respondent Washington Coalition for Open Government filed. (Distributed)
Mar 25 2010	Brief of respondent Washington Families Standing Together filed. (Distributed)
Mar 25 2010	Brief of respondent Secretary of State Sam Reed filed. (Distributed)
Mar 25 2010	Motion for divided argument filed by respondents Washington Coalition for Open Government.
Mar 31 2010	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Mar 31 2010	Motion for divided argument filed by respondent Washington Families Standing Together.
Apr 1 2010	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al.

	filed. (Distributed)
Apr 1 2010	Brief amici curiae of Direct Democracy Scholars filed. (Distributed)
Apr 1 2010	Brief amici curiae of Ohio, et al. filed. (Distributed)
Apr 1 2010	Brief amici curiae of National and Washington State News Publishers, et al. filed. (Distributed)
Apr 1 2010	Brief amicus curiae of City of Seattle filed. (Distributed)
Apr 1 2010	Brief amici curiae of Massachusetts Gay and Lesbian Political Caucus and Susan Wagner filed. (Distributed)
Apr 1 2010	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Apr 2 2010	Motion for leave to file amici brief out of time filed by American Business Media, et al.
Apr 16 2010	Motion for divided argument filed by respondent DENIED.
Apr 16 2010	Motion for divided argument filed by respondent DENIED.
Apr 19 2010	Motion for leave to file amici brief out of time filed by American Business Media, et al. GRANTED.
Apr 20 2010	Reply of petitioners John Doe #1, et al. filed. (Distributed)
Apr 28 2010	Argued. For petitioners: James Bopp, Jr., Terre Haute, Ind. For respondents: Robert M. McKenna, Attorney General, Olympia, Wash.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-559 NOV 5 - 2009

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners*

v.

Sam Reed et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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November 6, 2009

Question Presented

The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot ("petition signers"). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny. The questions presented are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

Parties to the Proceeding

Petitioners in this Court, Plaintiffs-Appellees below, are John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington, a state political committee and proponent of Referendum 71.

Respondents in this Court, Defendants-Appellants below, are Sam Reed, in his official capacity as Secretary of State of Washington, and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington.

Additional Respondents in this Court, Defendants-Intervenors-Appellants below, are Washington Coalition for Open Government, and Washington Families Standing Together.

Corporate Disclosure Statement

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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Petition

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Doe v. Reed*, __ F.3d __, 2009 WL 3401297 (9th Cir. 2009).

Opinions Below

The appellate order reversing the district court (App. 1a) is reported at __ F.3d __, 2009 WL 3401297 (9th Cir. 2009). The district court's order and opinion granting a preliminary injunction (App. 23a) is unreported.

Jurisdiction

The appellate court's order (App. 1a) was filed on October 15, 2009. The appellate court's opinion and judgment (App. 3a) was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The following are appended: First Amendment (App. 46a); Fourteenth Amendment (App. 46a); Washington Constitution, article II, § 1(b); Revised Code of Washington ("RCW") § 29A.68.011 (App. 47a); RCW § 29A.72.200 (App. 48a); RCW § 29A.72.230 (App. 49a); RCW § 29A.72.240 (App. 50a); RCW § 29A.84.210 (App. 51a); RCW § 29A.84.230 (App. 51a); RCW § 29A.84.250 (App. 52a); RCW § 42.17.010 (App. 53a); RCW § 42.56.001 (App. 55a); RCW § 42.56.010 (App. 56a); and RCW § 42.56.070 (App. 56a).

Statement of the Case

On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688.[1] (App. 29a.) It expands the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. (App. 29a.) It is commonly called the "everything but marriage" domestic partnership bill. (App. 7a.)

In Washington, such bills may be put to a referendum with sufficient signatures. Wash. Const. art. II, § 1(b). The petition forms used provide room for twenty signatures per page and require name, signature, home address, city, county, and (optional) email address. (App. 30a.)

Petitioner Protect Marriage Washington circulated a petition on Senate Bill 5688, designated Referendum 71. (App. 29a.) On July 25, Protect Marriage Washington submitted over 138,500 signatures to the Secretary of State ("Secretary"). (App. 20a.) Petitioners John Doe #1 and John Doe #2 signed the petition. The Secretary conducted an extensive canvass and verification of the petition signatures, determining that Referendum 71 qualified for the November 3 ballot.[2]

Washington's statutory scheme has protections for petition signer confidentiality. Referendum petitions are not made public by the statute that

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[1] Additional facts are in the district court Opinion. (App. 23a.)

[2] The signature verification process has been the subject of lawsuits during the pendency of this action, but none of the state court actions involve the issues presented here.

regulates referenda and initiatives, *see* RCW § 29A.72.010 *et seq.*, and proponents and opponents may have observers at the Secretary's verification, but observers may not make any record of names, addresses, or other information on the petitions. RCW § 29A.72.230 (observers may "make no record of the names, addresses, or other information on the petitions . . . ."). [3] Where the Secretary determines that the collected signatures are inadequate (and a court confirms, if appeal is taken), the petition is destroyed. RCW § 29A.72.200. So the names and other information of petition signers are divulged to the proponents of the referendum and the government for a very limited purpose—to ensure that there is sufficient public support for a referendum to justify placing it on the ballot and to allow public officials to verify the petition signatures.

For decades, and until just recently, public officials in Washington have repeatedly reaffirmed the confidentiality of petition signatures. Attorney general opinions from 1938 and 1956 stated that referendum petitions were not subject to public disclosure. Wash. Op. Att'y Gen. 378 (1938) (App. 61a); Wash. Op. Att'y Gen. 55-57 No. 274 (1956) (App. 63a). Even after the Public Records Act ("PRA") was enacted, RCW § 42.56.001 *et seq.*, then-

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[3] Citizens need not see the signatures to appeal the verification process to the Court system. They need only express dissatisfaction. RCW § 29A.72.240 ("Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may . . . apply to the superior court of Thurston County for a citation requiring the secretary of state to submit the petition to said court for examination . . . .").

Secretary of State Kramer declared that the petitions were not subject to public release, *see* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973 (App. 66a), because "the release of these signatures [has] no legal value, but could have deep political ramifications to those signing." A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973. (App. 67a.)[4]

Although historically such petitions have not been considered public records, the current Secretary considers referendum petitions public records under the Public Records Act and thereby subject to public disclosure under RCW § 42.56.070. Absent the stay issued by this Court, the petitions would have been subject to release to requesting groups.[5]

Among those requesting a petition copy under the PRA are KnowThyNeighbor.org and WhoSigned.org, who have publicly stated their intent to place the names and addresses of those who signed Referendum 71 on the Internet (App. 31a), and to make the names searchable, with the goal of encouraging individuals to have "personal" and "uncomfortable" conversations with petition signers. (App. 31a.)

On July 28, 2009, Petitioners filed suit in the district court seeking declaratory and injunctive

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[4] The position that these are not public records was upheld by state courts. *See Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

[5] Because of a temporary restraining order in a State case, the Secretary of State, out of caution, did not release the records between the time the Ninth Circuit issued their Stay, and when this Court vacated that Stay.

relief to prevent public release of petition signers' names and contact information.

In Count I of their complaint, Petitioners claimed that the PRA is unconstitutional, as applied to referendum petitions, because it violates the First Amendment free speech and association rights by not being narrowly tailored to a compelling state interest. (App. 24a.)

In Count II, Petitioners alleged that the PRA is unconstitutional as applied because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals." (App. 24a.) This reasonable-probability test was established in *Buckley v. Valeo*, 424 U.S. 1 (1976), and applied in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), and subsequent cases.

The State Respondents ("State") support the release of petition signers' names and contact information to facilitate these "conversations"—by disclosing petition signers' names and contact information—in light of a growing amount of evidence, which the State acknowledges, that these are not "conversations" at all, but "confrontations." Petitioners submitted numerous declarations from Washington, California, and across the country illustrating the sort of confrontations that have already occurred to those whose names are publicly associated with Referendum 71 or other similar ballot measures. For instance, Larry Stickney, the campaign manager for Protect Marriage Washington, has received an email death threat telling him to avoid areas of Washington, and another email threatening to hurt his family. Stickney has taken these threats seriously,

making his family sleep in an interior living room for safety and reporting threats to the sheriff.

On September 10, the district court, after extensive briefing by the parties and intervenors, and a preliminary injunction hearing, issued a preliminary injunction preventing the release of petition signers' names and contact information. (App. 23a.) The district court applied strict scrutiny and held that the Petitioners were likely to succeed on the merits and meet the other preliminary injunction elements. (App. 43a.)

On September 14, the State, followed later by intervenors, appealed to the Ninth Circuit, which consolidated their appeals.[6] (App. 10a.) The State asked the Ninth Circuit to stay the preliminary injunction pending appeal, overturn the preliminary injunction, and expedite in light of the November 3 election. (App. 10a.) The Ninth Circuit expedited the appeal and held oral argument on October 14. (App. 11a.)

On October 15, the Ninth Circuit issued an Order staying the preliminary injunction, effective immediately, and providing no reasoning[7] or stay of its Order (to allow for seeking a stay), both of which made it impossible to seek en banc review. (App. 1a; 10a.) Because of the Order's immediate effectiveness, the State could have, at any time, released the names of the petition signers to the public, causing irreparable harm to the First Amendment rights to free political

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[6] Intervenor Washington Coalition for Open Government filed a brief at the Ninth Circuit. Washington Families Standing Together did not file a separate brief.

[7] The closest the Ninth Circuit came to any reasoning was its statement that the District Court "relies on an incorrect legal standard." (App. 2a.)

speech, privacy, and association of the petition signers.[8]

Petitioners expeditiously sought a stay from this Court to prevent public release of petition signers' names and contact information. A stay was granted by Justice Kennedy (October 19) and then the full Court (October 20), pending resolution of a timely filed petition for writ of certiorari. (App. 21a, 22a.)

On October 22, the Ninth Circuit issued its opinion, applying intermediate scrutiny and finding anti-fraud and informational interests sufficient to justify making petition signers public. (App. 20a.) It neither considered Count II (which the district court did not reach because it decided for Petitioners on Count I) nor remanded for consideration of Count II (and, in any event, there was no time to do so because the Ninth Circuit immediately stayed the district court's preliminary injunction). (App. 10a.)

Reasons to Grant the Petition

I. The Decision Below Involves an Important Question of Law That Should Be Decided by this Court.

While this case involves the reversal of the grant of a preliminary injunction,[9] at its heart lies the First Amendment free speech and association issue of whether, when the sovereign people seek to put a

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[8] The Secretary did not publicly discloses petition signers' names and contact information because of state court litigation.

[9] This case also provides an opportunity to address the application of the preliminary-injunction standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), in a speech-protective manner to the First Amendment context. *See infra* at 29-31.

referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about *themselves* and their *support* for placing the measure on the ballot, or whether any State interests are satisfied by *private* disclosure.

The issue is arising with great frequency across the country as changes in technology have made it possible for individuals and groups seeking to prevent public debate from occurring to obtain the names and contact information of petition signers and post that information online to encourage harassment and intimidation. *See, e.g.*, http://knowthyneighbor.org/ (searchable databases with petition-signer information on marriage issues in Arkansas, Florida, Massachusetts, and Oregon). This petition process itself is widespread in the United States. Twenty-seven states have either an initiative process, a referendum process, or both. Initiative and Referendum Institute, *I & R Factsheet*, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/Handout%20-%20What%20is%20IR.pdf. The number of signatures required to put a referendum petition on a ballot differs from state to state, and can require the signatures of a large number of individuals. For example, Washington requires that a referendum petition contain signatures equal to or exceeding four percent of the votes cast for governor at the previous gubernatorial election. Wash. Const., art. II, § 1(b). In contrast, in Idaho a referendum petition must contain the signatures of six percent of the qualified electors at the time of the last general election. Idaho Code Ann. § 34-1805 (2009).

This is an important question of law that has not been, but should be, decided by this Court.

A. Petitioners Had Likely Success on the Merits.

As should happen in First Amendment cases, the district court's grant of a preliminary injunction and the appellate court's reversal turned on their holdings as to the likelihood of success on the merits. The other preliminary-injunction elements (*see infra*) essentially follow the finding on this element.

1. Public Disclosure Here Implicates First Amendment Privacy of Speech, Association, and Belief and Constitutes Compelled Speech.

As we are reminded in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL-II*"),[10] it is vital to begin with the First "Amendment itself: 'Congress shall make no law . . . abridging the freedom of speech.' The Framers' actual words put these cases in proper perspective." *Id.* at 482 (*quoting* U.S. Const. amend. I).

The First Amendment includes a right to speak and associate, along with a right of privacy in one's speech, association, and belief. *See Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"), *id.* at 66 ("the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations"), 75 ("strict standard of scrutiny" required "for the right of associational privacy").

In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Buckley v. American Constitutional*

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[10] This opinion ("*WRTL-II*") states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

Law Foundation, 525 U.S. 182 (1999) ("*Buckley-II*"), this Court addressed compelled public disclosure in violation of First Amendment privacy. Two types of public disclosure were at issue in each case: (1) public disclosure of one's *identity* and (2) public disclosure about one's *belief* that a measure should be defeated or put on the ballot. In *McIntyre*, Mrs. McIntyre was not required by the government to publicly disclose her belief that a referendum should be defeated (a belief that she disclosed by distributing handbills at public meetings), but she objected to public disclosure of her identity on her handbills, if she did so. 514 U.S. at 337-38. In *Buckley-II*, paid petition circulators were compelled to both solicit petition signers and publicly identify themselves in order to qualify a measure for the ballot. 525 U.S. at 186.

The present case is more like *Buckley-II*, where petition signers are subject to compelled public disclosure of *both* their identity and belief. Petitioners object to the public disclosure of both their *identity* and their *belief* that Referendum 71 should be placed on the ballot. They claim their First Amendment privacy right against public disclosure of their speech, association, and belief.[11]

While First Amendment privacy protection against compelled public disclosure of identity and belief does

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[11] Absent a compelling interest, government may not compel speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto); *Miami Herald Publishing Comp. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publication of candidate reply); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (disclosure of membership lists for tax purposes absent showing group is subject to licensing or tax requirement); *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (schoolchildren flag salute).

not depend on the reason why one asserts the protection, this Court has identified reasons for asserting the protection. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. These reasons inform the following analysis.

Viewing Washington's referendum qualification process from the perspective of compelled speech, those engaging their right to associate and speak for the purpose of putting a referendum on the ballot are faced with three levels of compelled speech.

First, Washington compelled 120,577 people[12] to speak and associate by signing petitions to qualify a referendum. There are less burdensome means for qualifying referenda, but the State's system is not challenged here. This signing of petition sheets is a private disclosure of identity and belief, not a public one. Just as the Framers who published the Federalist Papers without publicly disclosing themselves had to privately associate with a printer and colleagues for the purpose of printing, binding, and distributing their pamphlets, those seeking to qualify a referendum associate privately with others. Petition signers disclose their identity to a petition circulator, who is

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[12] This is the number of individuals equal to four percent of those who voted for governor in Washington's last gubernatorial election, and is the number required by the Washington Constitution for a referendum to qualify for placement on the ballot. Wash. Const. art II, § 1(b). Petitioners submitted an excess number of signatures to ensure they obtained a sufficient number of signatures to appear on the ballot.

acting as the agent of the referendum proponents. Petition signers also disclose their identity to potentially nineteen other persons signing petition sheets containing twenty names, as they associate together to get the referendum on the ballot. And petition signers disclose their identity to the referendum proponents who collect and review the petition sheets before submitting them to the Secretary. Regarding *McIntyre*'s "desire to preserve as much of one's privacy as possible," 514 U.S. at 342, this is a minimal, private disclosure necessary to advance the common cause of qualifying the referendum for the ballot. Regarding *McIntyre*'s "fear of economic or official retaliation [or] . . . concern about social ostracism," *id.* at 341, this private disclosure poses little risk because the proponents, the circulator, and the other persons signing on the same petition sheet share the common cause of getting the referendum on the ballot.

Second, the petition signers and other members of the private association seeking to place the referendum on the ballot are compelled to speak when they submit the signatures to the Secretary for canvass and verification. This is no longer totally private speech and association, but it is "public" only in the sense that it is revealed to a public official (the Secretary) and those directly involved in the canvass and verification. It is not disclosure of identity and belief to the general public. Here also there is little concern about giving up privacy or of social ostracism or retaliation because of the statutory protections, such as the fact that a government official retains the compelled information, observers of the canvass and verification may not write down any of the disclosed information, review of verification (if requested) is done confidentially by a court, and if the referendum is not qualified then the

petition sheets are destroyed. *See supra* 2-4. Compelling this minimal disclosure to the government is justified by the interests the State has in not bearing the expense of putting issues on the ballot that have little public interest and in not requiring others to participate in this election absent such support.

Third, the petition signers are compelled to speak to the public, disclosing their identity and beliefs, if the petitions are released to the public. Suddenly one's privacy of speech and association vanishes and the concerns about social ostracism and retaliation rush forward. The question addressed in this case is whether the government can justify this level of compelled speech.

Important to the analysis is the distinction between private disclosure to the government and public disclosure. This distinction is illustrated in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), a case involving an FEC investigation of campaign-finance complaints against the AFL-CIO, the Democratic National Committee ("DNC"), and others. The FEC compiled numerous internal documents detailing information about volunteers, members, employees, activities, and political strategy that it then planned to make public pursuant to its rule requiring public release of investigation materials in closed cases. The union and DNC "assert[ed] that releasing the names of hundreds of volunteers, members, and employees w[ould] make it more difficult for the organizations to recruit future personnel." *Id.* at 176.[13] The court's analysis empha-

[13] In addition to this future chill, the court noted that disclosure of strategies to opponents would "frustrate the organizations' ability to pursue their political goals effectively." *AFL-CIO*, 333 F.3d at 177.

sized the private-public distinction: "[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that '[c]ompelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." *Id.* at 176 (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*). The Court held that the public-disclosure rule violated the First Amendment. The transferrable concept is that private (to the government) disclosure sufficed for government enforcement purposes and public disclosure was unjustifiable and in violation of First Amendment speech and association rights. Petitioners assert that any interests that Washington has may be met by private disclosure to the government. *See infra.*

Where a government authority is charged with overseeing core political activity, its activity must be carefully scrutinized. This was affirmed in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), which noted that the creation of such an authority as the FEC "raises weighty constitutional objections, and its authority to exercise control over an area where 'uninhibited, robust, and wide open' activity is constitutionally protected was approved by the Supreme Court only after being meticulously scrutinized and substantially restricted." *Id.* at 387 (citation omitted). In the present case, where the Secretary is charged with regulating core political activity by the people in their sovereign capacity, the Secretary's policy of public disclosure policy bears specially strict scrutiny and special justification.

Compelling public disclosure of one's speech, association, and belief requires special justification because

"[m]erely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of government interference . . . ." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the present case, compelled public disclosure likewise forces a petition signer to disclose "past expressions and associations." *Id.* The fact that the present public disclosure is marginally less direct than being summoned as a witness matters not because "[g]overnment action may be subject to constitutional challenge even though it only has an indirect effect on the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). "The fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of first amendment rights as imprisonment, fines, injunctions, or taxes." *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950). "It is axiomatic that when the actions of government officials so directly affect citizens' First Amendment rights, the officials have a duty to take the least intrusive measures necessary to perform their assigned functions." *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000). "In making their First Amendment claim, Plaintiffs were obligated to prove only that the officials' actions would have chilled or silenced 'a person of ordinary firmness from future First Amendment activities,' not that their speech and petitioning were 'actually inhibited or suppressed.'" *Id.* at 1241 (citation omitted).

From the foregoing, it is clear that compelled public disclosure of the identity and belief of petition signers

burdens speech, association, and belief that the First Amendment was meant to protect. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This compelled speech is no mere ministerial, procedural matter dealing with the administration of elections. It is core political speech highly protected by the First Amendment.

This is borne out by this Court's referendum jurisprudence. *See generally Buckley-II*, 525 U.S. at 182; *McIntyre*, 514 U.S. at 345-46; *Meyer v. Grant*, 486 U.S. at 422, 425 (1988); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ("*CARC*"); *Bellotti*, 435 U.S. at 765. In each case, the law implicated protected expression. *See Buckley-II*, 525 U.S. at 186-87 ("circulation is 'core political speech'"); *McIntyre*, 514 U.S. at 345-46 (not election mechanics but regulates speech); *Meyer*, 486 U.S. at 421 ("circulation . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change"); *CARC*, 454 U.S. at 294-95 ("practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."); *Bellotti*, 435 U.S. at 785-86 (corporate right to engage in political speech regarding initiative). *See also Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1030-31 (9th Cir. 2009) (compelled disclosure is protected speech in ballot-initiative context); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) (same) ("*CPLC-I*"); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (circulation is protected speech); *Hegarty v. Tortolano*, No. Civ.A. 04-11668-RWZ, 2006 WL 721543, *2 (D. Mass. Mar. 17, 2006) ("signing a petition . . . constitutes speech").

2. Strict Scrutiny Was Required.

In considering applicable scrutiny, the district court recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Buckley-II*, 525 U.S. at 187 (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)). It noted that "government may infringe on an individual's rights to free speech but only to the extent that such infringement is narrowly tailored to serve a compelling government interest." (App. 38a (*citing McIntyre*, 514 U.S. at 346-47).) This agrees with this Court's holding that when a law restricts "core political speech" or "imposes 'severe burdens' on speech or association," the law must be narrowly tailored to serve a compelling government interest. *See Buckley-II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or imposing substantial burdens on First Amendment rights are always subject to strict scrutiny). *See also Buckley-II*, 525 U.S. at 192 n.12 (strict scrutiny required); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It] must survive exacting scrutiny. . . .").

"Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny" of compelled disclosure provisions, *id.* at 64, which it called the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See WRTL-II*, 551 U.S. 449, n.7 (2007) (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny"); *see also McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786) (equating "exacting" scrutiny with "strict" scrutiny). In *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008), this Court said that

"exacting scrutiny" requires that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Here, given the serious harm to free speech and association from public disclosure, the scrutiny must be strict. Moreover, "there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id.* (citation omitted), which nexus simply does not exist here, especially given the anemic nature of asserted interests. *See infra.*

That the cost of disclosure is high has become more clear since *Buckley* was decided. *See* 424 U.S. at 67, 72, 83 (concluding that "sunlight is said to be the best of disinfectants" without the benefit of any research as to the effect of disclosure on First Amendment rights). Subsequent courts and disclosure advocates have seized upon this language and often fail to ask whether disclosure is narrowly tailored to serve a compelling government interest; they often treat disclosure, or often "transparency," as a meaningful end in itself and ignore the substantial First Amendment burdens.[14] Time, experience, and studies have revealed the true costs inflicted by disclosure and suggest that it may be time reemphasize the importance of applying strict scrutiny to each application of a disclosure statute.

In 2007, the Institute for Justice commissioned one of the *first* studies to analyze the effects of disclosure

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[14] *See, e.g.*, David Ammons, *Who Signs R-71? Foes May Post it Online*, Wash. Sec'y of State Blogs, June 2, 2009) (*available at* http://www.blogs.secstate.wa.gov/FromOurCorner/index.php/2009/06/who-signs-r-71-foes-may-post-it-online/)(discussing State's commitment to "transparency"). David Ammons is the Communications Director for the Secretary.

on freedoms of speech, association, and belief. *See* Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts.html) ("*Disclosure Costs*"). While the study involved campaign *finance* disclosure provisions, its findings illustrate the disconnect between public perception and actual evidence regarding disclosure.

Carpenter's study is important because it probed respondents beyond their general sentiments about disclosure statutes. Thus, consistent with prior surveys, Carpenter reported that nearly 80% of respondents favored the disclosure of the identities of individuals contributing to a ballot measure campaign.[15] *Id.* at 7. However, unlike prior surveys, Carpenter went a step further and probed respondents about the specifics of disclosure statutes. For example, when the issue was personalized, support waned significantly. *Id.* Only 40% felt that their own name and address should be included and fewer still (24%) felt that the name of their employer should ever be required. *Id.* And nearly 60% of respondents indicated that they would think twice before contributing if it meant that their name and address would be released to the public. *Id.* Even those who strongly supported disclosure indicated that

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[15] Respondents were asked to state how they felt about the following statement. "The government should require the identities of those who contribute to ballot issue campaigns to be available to the public." The results are consistent with the findings of David Binder, relied upon by the court in *California Pro-Life Council, Inc. v. Randolph*, 507 F. 3d 1172 (9th Cir. 2007), where 71% of respondents felt that it was important to know the identities of individuals that contributed to a ballot measure committee. *Id.* at 1179.

they would be less likely to contribute if their own personal information would be released. *Id.*

Among reasons for not wanting personal information released, respondents cited a desire to remain anonymous, fear of retaliation (personal and economic), and that public disclosure would take away their right to a secret ballot. *Id.* Carpenter also explored how the public uses the publicly disclosed information and concluded:

> The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure.

Id. at 13. *See also* Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, 578 (Spring 2009) (available *at* http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf) (exploring further how the public fails to use disclosure reports). Thus, disclosure provisions do little to address the problem of voter ignorance described in *Buckley*, 424 U.S. at 68, while imposing substantial burdens on the First Amendment rights to privacy in speech, association, and belief.

Supplementing Carpenter's studies are real-world examples of harms resulting from disclosure provisions

during recent elections.[16] *See, e.g.*, Brief of *Amicus Curiae* Alliance Defense Fund in Support of Appellant at 16, *Citizens United v. FEC*, No. 08-205 (U.S. 2009) (discussing reprisals against donors supporting California's Proposition 8 in 2008); Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (available at http://www.heritage.org /Research/Family/bg2328.cfm) (same).

Petitioners here fear that similar reprisals will be directed at petition signers, especially in light of the threats and harassment already directed at individuals connected to the Referendum 71 campaign. *Supra* 5.

Technology has also dramatically altered the disclosure environment considered by this Court in *Buckley*. In theory, government records under the PRA were "public" in 1976, but access meant a trip to a governmental office during normal business hours. (App. 61a (Initiative 276 § 28 1972)). To search through records an individual had to manually flip

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[16] Evidence of social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (per curiam). Evidence ranged from numerous contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes not popular everywhere and the results of such disclosure. *Id.*; William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis, White, *and the Future of Judicial Campaign Financing*, 86 Denv. U. L. Rev. 195, 218-20 (2008) (discussing disclosure burdens).

through records stuffed into a filing cabinet.[17] And it was often cost-prohibitive for an individual to obtain copies of the records. *See* Brian Zylstra, *The disclosure history of petition sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/).

Today, records are kept in computer databases. Copies cost a nominal fee, are provided in electronic format, and can be uploaded to the Internet in searchable databases almost instantly. *See, e.g.*, http://knowthyneighbor.org (stating Washington is "Up Next"). Once on the internet, the information can be combined with publicly available phone numbers and maps. *See, e.g., Prop. 8 Maps*, http://www.eightmaps.com.

In today's "information age," courts cannot ignore the tremendous invasions of privacy that occur when the government compels disclosure and allows it to become part of the public record. For example, the Federal Rules of Civil Procedure now require litigants to redact certain personal identifying information because of identity theft concerns. Fed. R. Civ. P. 5.2. The rule goes further, allowing parties to move, for good cause, to redact additional information and limit or prohibit non-parties' electronic access to filed documents. *Id.*

However, the concerns here go far beyond identity theft. An employer no longer has to visit a government office building during normal business hours to learn

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[17] For example, Protect Marriage Washington submitted over 9,000 petitions sheets containing the names and other personal information of 138,000 individuals. (App. 7a.)

who among her employees supported a particular referendum—she can do it from the comfort of her office. The same can be said about curious customers, suppliers, or neighbors. Furthermore, recent elections demonstrate how individuals use disclosure reports to harass and intimidate individuals simply exercising their First Amendment right to engage in the political process. As Kim Alexander, president of the California Voter Foundation, recently said, "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you." Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009).

Because of these disclosure burdens on free speech, expression, and belief, "exacting scrutiny" is strict scrutiny or its equivalent should be applied. Under strict scrutiny, Washington bears the burden of proving that the PRA, as applied to public disclosure of petition signers' identity and beliefs, is narrowly tailored to a compelling interest. *See WRTL-II*, 551 U.S. at 464-65.

3. Asserted Interests Were Not Compelling.

Although *Buckley* involved candidates, contributions, and expenditures, none of which apply here, it provides guidance on possible interests:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Information Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contribu-

> tions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")]."

Id. at 66-68. *Buckley*'s Information Interest is focused on "campaign money," not involved in petition signing. And the Corruption and Enforcement interests are unique to candidate elections and cannot justify public disclosure of petition signers. *See Bellotti*, 435 U.S. at 789-90; *Canyon Ferry*, 556 F.3d at 1031-32; *CPLC-I*, 328 F.3d at 1105 n.23.

a. No Information Interest Is Compelling

The State asserts an information interest in publicizing names and contact information of petition signers. This interest is not compelling.

First, the Information Interest is not absolute. It is designed to disclose who has demonstrated an interest in a referendum through contributions and expenditures. *See Canyon Ferry*, 556 F.3d at 1032-33. It is not designed to advise the public who might generally favor or oppose referenda (even if merely signing a petition reliably indicated that, *see infra*). An information interest that broad could justify requiring petition signers to disclose religious affiliation or income because such data could play a role in the voter's decision-making process. That would be extremely burdensome and chilling.

Second, the interest is compelling only if the information conveyed to the voters is significant. Marginal information gains cannot justify the substantial burdens imposed by compelled disclosure of the identi-

ties of 138,000 individuals.[18] This is especially important in the petition context where signatures may not reveal support or opposition because signers state only that an issue is too important to be left to legislatures. (App.42a.) Thus, disclosing petition signers may spread misinformation about who supports or opposes referenda. So the State lacks a compelling information interest in publicly disclosing petition signers.

b. No Anti-Fraud Interest Is Compelling.

The State asserts an anti-fraud interest that must also fail. First, fraud is a lesser concern during signature gathering than while voting. *Meyer*, 486 U.S. at 427-28. This is due to the justification for petition requirements—ensuring that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot. At the petition stage, the question is merely whether the people should have the final say. Proponents failing to collect enough signatures would likely see their referendum fail at the polls.[19] This provides little incentive for fraud during petition circulation, especially given the potentially severe criminal penalties. RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. Second, prosecution for fraud in petitions is rare. *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (two in seven years). More importantly, such fraud was detected with traditional methods (signature compari-

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[18] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (remedy must alleviate problem in "direct and material way.").

[19] In Washington, a referendum petition must collect signatures equal to or exceeding four percent of the signatures cast for governor at the previous gubernatorial election. Wash. Const., art. II, § 1(b).

son), public disclosure playing no part. *Id.* Third, although petitions have been released in recent years, the State has produced no fraudulent signature detected as a result of such public release.[20] This interest is not compelling.

4. Public Disclosure Is Not Narrowly Tailored And There Are Less-Restrictive Means.

Even if the asserted interests were compelling, public disclosure of petition signers is not narrowly tailored, and there are less-restrictive means of advancing any interest, making compelled disclosure of petition signers' identity and beliefs unconstitutional.

a. Public Disclosure Is Not Narrowly Tailored to Any Information Interest.

Any information interest is more directly served through tailored regulations. There is already adequate public information about *proponents* and *financial* supporters. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Washington Secretary of State, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step to start referendum is registration with campaign finance commission). Washington's long history of not publicly disclosing petition signers, *see supra* at 2-4, reveals that this more narrowly tailored approach adequately served any information (and anti-fraud) interest.

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[20] Even if the State were able to produce such evidence, a single fraudulent signature detected through the public release of a referendum petition is unlikely to justify the burdens that such disclosure represents. *See Turner Broad. Sys.*, 512 U.S. at 664 (remedy must alleviate problem in "direct and *material* way") (emphasis added).

Even as to *contributions*, states may not require disclosure of contributors of de minimis amounts to ballot measure campaigns. *Canyon Ferry*, 556 F.3d at 1034. The interest in compelling public disclosure of *petition signers'* identity and beliefs is less weighty, so states cannot compel petition disclosure of petition signers' identity and beliefs under the First Amendment. *Id.* As Judge Noonan asked in concurrence, *id.* at 1036, "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'" Here one could ask, "How the names of petition signers affect anyone else's vote? Does any voter exclaim, "Hank Jones signed the petition. I must be against it!"

b. Public Disclosure Is Not Narrowly Tailored to Any Anti-Fraud Interest.

Any anti-fraud interest is met by narrowly-tailored, less-restrictive means. First, there is limited, private disclosure to the government for signature verification. Only the Secretary has authority to canvass and verify petition signatures.[21] RCW § 29A.72.230. This serves the State's interest in ensuring that sufficient voters support the referendum. Since there is no mechanism allowing individual challenges to petition signatures on the referendum petitions, the assertion that individuals will check fraud rings hollow. The integrity of the election process is protected by the Secretary who verifies signatures, by observers who ensure proper procedures, and by potential subsequent judicial review. *See supra* at 2-3. The fact that public disclosure occurs under the PRA, not the elections code, illustrates the weakness of the asserted interest. If the goal

[21] *See supra* n. 3.

were to allow for public assistance in the signature verification process, one would expect the elections code to mandate public disclosure and provide procedures for submitting contested names. And while Washington has released petitions, it cites no instance where release yielded detection of a fraudulent signature. *See Washington Initiatives Now*, 213 F.3d at 1139.

Second, if Washington truly believes that its Secretary cannot be trusted to verify signatures, that its scheme of monitors and court review is inadequate to provide a check on the Secretary, and that citizens are needed for an independent canvass and verification, it could create some special mechanism for doing so while protecting privacy so as not to chill speech and association. It could randomly select citizen panels, along the lines of a grand jury, with members bound to secrecy in doing an independent canvass and verification.

Third, there are criminal penalties. The State has failed to demonstrate that the criminal penalties, *see* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250, are inadequate to deter fraud. *See WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"); *Buckley*, 424 U.S. at 56 ("There is no indication that the substantial criminal penalties for violating [the Act] combined with the political repercussion of such violations will be insufficient to police [the Act]."). The fact that fraud prosecutions have been rare, *Washington Initiatives Now*, 213 F.3d at 1139, indicates that penalties are adequately serving any anti-fraud interest.

The State failed to prove that public disclosure of petition signers' identity and beliefs is narrowly

tailored to an anti-fraud interest, and it has failed to show that less-restrictive means are inadequate.

In sum, the State failed to meet its burden of proving that public disclosure of petition signers is narrowly tailored to any compelling interest. Consequently, Petitioners had likely success on the merits of their claim.

B. Petitioners Met the Other Elements for a Preliminary Injunction.

In First Amendment cases, meeting the other preliminary-injunction elements essentially follows the likelihood of success on the merits. Where it is likely that one will succeed in proving that privacy of petition signers' speech, association, and belief is protected by the First Amendment, there is irreparable harm if that privacy is violated by compelled speech, the government has no interest in violating constitutional rights, and enforcing constitutional liberties is clearly in the public interests. These elements are considered briefly below.

1. Speech-Protective Standards Control.

Because this is a First Amendment preliminary-injunction case, it provides this Court the opportunity to apply its standards set out in *Winter*, 129 S. Ct. 365, to the free speech, association, and belief context. Where these are involved, preliminary injunction standards must be speech- and association-protective. While fuller briefing must await merits briefing, here is a brief list of protections that should be, but are not regularly, afforded in First Amendment cases.

First, preliminary injunction standards involving expressive association must reflect our constitutional principles that "[i]n a republic . . . the people are

sovereign," *Buckley*, 424 U.S. at 14, and there is a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (citation omitted). So the First Amendment's presumption of "no law," i.e., "freedom of speech" and expressive association, must be the constitutional *default* and the overriding *presumption* where expressive association is at issue.

Second, this presumption means that First Amendment protections must be incorporated into the preliminary injunction standards, not limited to merits consideration. So if exacting or strict scrutiny applies, as here, the preliminary-injunction burden shifts to the state to prove the elements of strict scrutiny and show the inadequacy of proffered less-restrictive means. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

Third, because exacting or strict scrutiny is the antithesis of deference or a presumption of constitutionality, no deference or favorable presumption must be afforded the regulation of speech in preliminary injunction balancing.

Fourth, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL-II*, 551 U.S. at 474.

Fifth, state officials have no per se interest in regulating expressive association. Their first loyalty should be to the First Amendment. Beyond that, their only interest is in enforcing the laws *as they exist*, with any interest in the particular *content* of those laws being beyond their interest in the preliminary injunction balancing of harms.

Sixth, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal citation omitted).[22] Against this need for proof of real harm if a law of questionable constitutionality is preliminarily enjoined is the paramount fact that the protection of First Amendment rights is very much in the public's interest.

Seventh, the status quo to be preserved in a First Amendment case must be the freedom of speech before the governmental restriction. If the protected status quo is the restriction, government may simultaneously violate free speech and association and shield itself from preliminary injunctions.

2. Plaintiffs Had Irreparable Harm.

If the identity and beliefs of petition signers had been publicly disclosed, their First Amendment right to privacy in speech, association, and belief would have been immediately and irreparably harmed because such compelled disclosure was not narrowly tailored to a compelling interest. And if Plaintiffs had not received judicial protection, they would have suffered the irreparable injury of a reasonable probability of

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[22] *See also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."). *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (same); *see also id.* at 192 (FEC may not *speculate* that NRA received more because it did not record contributions of under $500, citing *Turner*, 512 U.S. at 664).

threats, harassment, and reprisals, which would also have chilled future participation in core political activity.

"Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod*); *Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when Plaintiffs state a colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.").

3. Balancing Equities Favored Petitioners.

In the Ninth Circuit, "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). This is true even where "the merits of the constitutional claim were not clearly established at this early stage in the litigation," *id.* (internal quotations and citations omitted), although they were clearly established in the present

case. This speech- and association-protective standard should govern First Amendment cases.

Here, once the names of the petition signers were released to groups indicating they would place petition signers' names on the Internet, would contact signers, and would encourage harassment of signers, the First Amendment rights of those who signed the Referendum 71 petition would have been violated. Considering the anemic nature of the interests asserted in this context, a balance of harms favored Petitioners in this First Amendment context.

4. An Injunction Served the Public Interest.

The Ninth Circuit has recognized that "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Sammartano*, 303 F.3d at 974 (*quoting G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to deny injunctive relief. *Id.* (noting lack of plausible justification).

In the present case, there was no interest—strong or otherwise—to justify the challenged public disclosure of petition signers' identity and beliefs. It is in the public interest that First Amendment freedoms be preserved.

Conclusion

This case may be decided on very narrow grounds. The State asserts anti-fraud and information interests, but these are weak (if even existent) in the context of publicly disclosing petition signers' identity and beliefs. This case involves a referendum, so there is no corruption concern. It involves no contributions or expenditures, so there is no money to follow. It is not even about whether a referendum should be passed, only whether it should be on the ballot (and some may support it being on the ballot without stating a position on the ultimate issue). Any state interest may be accommodated by *private* disclosure (to government authorities) instead of *public* disclosure. Consequently, the First Amendment right to privacy in speech, association, and belief protects against the public disclosure of petition signers' identity and beliefs. For the reasons stated, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, et al., Plaintiffs-Appellees,	)	
v.	)	No. 09-35818
SAM REED, et al., Defendants-Appellants	)	
JOHN DOE #1, et al., Plaintiffs-Appellees,	)	
v.	)	
SAM REED, et al., Defendants-Appellants	)	No. 09-35826
and	)	
WASHINGTON COALITION FOR OPEN GOVERNMENT, Defendants-Appellants-Intervenors.	)	

JOHN DOE #1, et al., Plaintiffs-Appellees, v. SAM REED, et al., Defendants- Appellants and WASHINGTON FAMILIES STANDING TOGETHER, Defendants- Appellants- Intervenors.	)	No. 09-35863

ORDER

The court, after consideration of the record and briefs of the parties, and oral argument, has determined that the district court's Order Granting Plaintiffs' Motion for Preliminary Injunction (the "Preliminary Injunction Order"), filed September 10, 2009, relies on an incorrect legal standard and, therefore, must be reversed.

It is therefore **ordered**:

1. Appellants' motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals.

2. An opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order

shall be issued expeditiously and in due course.

[Editor's Note: Page numbers from the unreported opinion (*) and the reported opinion, __ F.3d __, 2009 WL 3401297 (**), are indicated. Only the Westlaw citation is available as of the printing of this appendix.]

[Doc. 7095972, filed October 22, 2009]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, et al., Plaintiffs-Appellees,	)	
v.	)	No. 09-35818
SAM REED, et al., Defendants-Appellants	)	
JOHN DOE #1, et al., Plaintiffs-Appellees,	)	
v.	)	
SAM REED, et al., Defendants-Appellants	)	
	)	No. 09-35826
and	)	
WASHINGTON COALITION FOR OPEN GOVERNMENT,	)	

Defendants-Appellants-
Intervenors.

JOHN DOE #1, et al.,
Plaintiffs-Appellees,

v.

SAM REED, et al.,
Defendants-Appellants

and

WASHINGTON FAMILES
STANDING TOGETHER
Defendants-Appellants
Intervenors.

No. 09-35863

OPINION

[1]** Washington's Secretary of State and Public Records Officer (together, the "State") and Intervenors, Washington Coalition for Open Government ("WCOG") and Washington Families Standing Together ("WFST"), appeal a decision of the district court granting Plaintiffs, Protect Marriage Washington ("PMW") and two individual signers of the Referendum 71 petition, a preliminary injunction prohibiting the State from making referendum petitions available in response to requests made under Washington's Public Records Act (the "PRA"). Wash. Rev. Code § 42.56.001 *et seq.*

Under the Washington Constitution, a referendum must be ordered on a bill passed by the legislature if a

specified percentage of voters sign a petition for a referendum. The Referendum 71 petition calls for a statewide election on Engrossed Second Substitute Senate Bill 5688 ("SB 5688"), which would expand the rights and responsibilities accorded state-registered domestic partners. The PRA makes public records, including referendum petitions, available for public [*4] inspection. In seeking a preliminary injunction, Plaintiffs argued that, as applied to referendum petitions, the PRA violates the First Amendment. We have jurisdiction over this appeal from the district court's grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We reverse.

BACKGROUND

I. Washington's Public Records Act

The PRA requires state agencies to make public records available for public inspection and copying. Wash. Rev. Code § 42.56.070. It provides that "[i]n the event of conflict between the provisions of [the PRA] and any other act, the provisions of [the PRA] shall govern." Wash. Rev. Code § 42.56.030. Although the PRA contains some exemptions, none applies to referendum petitions. The PRA was enacted through the initiative process and includes its own rule of construction:

> The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

Wash. Rev. Code § 42.56.030.

II. Washington's Referendum Process

[*5] Under the Washington Constitution, although legislative authority is vested in the state legislature, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, §§ 1 & 1(b).[1] To initiate the referendum process, petitions must be filed with the Secretary of State containing the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor in the immediately preceding gubernatorial election. Wash. Rev. Code § 29A.72.150. Referendum petition sheets must include a place for each signer to sign and print his or her name, address, city, and county at which he or she is registered to vote. Wash. Rev. Code § 29A.72.130.

[2]** Once the referendum petition is filed, the Secretary of State must verify and canvass the names of the voters who signed the petition. Wash. Rev. Code § 29A.72.230. The verification and canvassing "may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county." *Id.* The Secretary of State may limit the number of **[*6]** observers to two opponents and two proponents of the referendum if the Secretary of State deems that "a greater number would cause undue delay or disruption of the verification process." *Id.*

After verification and canvassing, the Secretary of

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[1] The Washington Constitution includes some exceptions to this reserved power, but none applies in this case.

State issues a determination of whether the referendum petition contains the requisite number of valid signatures. Any citizen dissatisfied with that determination may apply to the Thurston County Superior Court for a citation requiring the Secretary of State to submit the petition to the superior court "for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be." Wash. Rev. Code § 29A.72.240. Within five days of the superior court's decision, a party may seek review by the Washington Supreme Court. *Id.*

If it is ultimately determined that a petition contains the requisite number of valid signatures, the referendum is submitted to a vote at the next general election. Wash. Const., art. II, § 1(d).

III. Referendum 71

The Washington Governor signed SB 5688 on May 18, 2009. Known as the "everything but marriage act," the bill expands the rights and responsibilities of state-registered domestic partners. On or about May 4, 2009, Larry Stickney, the **[*7]** campaign manager for PMW,[2] filed notice with the Secretary of State of his intent to circulate a referendum petition on SB 5688. On July 25, 2009, PMW submitted the petition with more than 138,500 signatures to the Secretary of State for verification and canvassing.[3]

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[2] PMW was organized as a state political committee pursuant to Wash. Rev. Code § 42.17.040. Its purposes are to collect the requisite number of signatures to place Referendum 71 on the ballot and to encourage Washington voters to reject SB 5688.

[3] The State asserts that about 122,000 signatures were valid. Presumably, the PRA would make available all 138,500 signa-

The petition, entitled "Preserve Marriage, Protect Children," includes a table for the following information for each signer: printed name, signature, home address, city and county, and an optional email address. The petition also states:

> To the Honorable Sam Reed, Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum No. 71 . . . shall be referred to the people of the state for their approval or rejection at the regular election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally received this petition, I am a legal voter for the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

[*8] [3]** Pursuant to Wash. Rev. Code § 29A.72.140, the petition warns that "[e]very person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs the petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both."

As of August 20, 2009, the Secretary of State had received public record requests for the Referendum 71 petition from Brian Murphy of WhoSigned.org, Toby Nixon of WCOG, Arthur West, Brian Spencer on behalf of Desire Enterprises, and Anne Levinson on behalf of

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tures, however, because all petition sheets, not only valid signatures, comprise the public records.

WFST. Two entities, KnowThyNeighbor.org and WhoSigned.org, publicly stated that they intend to publish the names of petition signers on the internet. Plaintiffs allege that these two groups have encouraged individuals to contact petition signers to have "personal" and "uncomfortable" conversations.[4]

IV. Procedural History

[*9]On July 28, 2009, Plaintiffs filed this action, seeking to enjoin the State from publicly releasing documents showing the names and contact information of the individuals who signed petitions in support of Referendum 71. Count I of the complaint alleges that, as applied to referendum petitions, the PRA violates the First Amendment because the PRA is not narrowly tailored to serve a compelling government interest. Count II alleges that, as applied to the Referendum 71 petition, the PRA is unconstitutional because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals."

The district court granted Plaintiffs a temporary restraining order on July 29, 2009, and, after a hearing, granted Plaintiffs' motion for a preliminary injunction on September 10, 2009, enjoining release of

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[4] Plaintiffs appear to be referring to a June 8, 2009, press release:

> "What does happen," says [Aaron Toleos, co-director of KnowThyNeighbor.org], "is that conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors."
>
> "These conversations can be uncomfortable for both parties," he said, "but they are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common."

the Referendum 71 petition.[5] The district court applied strict scrutiny to the PRA and concluded that Plaintiffs established they were likely to succeed on Count I of their complaint.[6] The State and Intervenors timely appealed.

On September 14, 2009, the State moved this court for an emergency stay and to expedite its appeal. We consolidated the State's appeal with those of **[*10]** Intervenors WCOG and WFST. Because the election on Referendum 71 is set for November 3, 2009, we ordered expedited briefing on the consolidated appeals and heard oral argument on October 14, 2009, on the merits of the appeals, as well as on the stay motion.[7] On October 15, 2009, we granted a stay pending our disposition on the merits of these appeals.[8] We now reverse the preliminary injunction.

STANDARD OF REVIEW

As recently articulated by the Supreme Court, a "plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits,

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[5] On September 3, 2009, the district court granted the motions to intervene of WFST and WCOG.

[6] The district court based its preliminary injunction only on Count I. Because the district court did not reach the merits of Count II, we likewise do not reach Count II in reviewing the injunction.

[7] We appreciate all counsel's efforts and cooperation in meeting a highly-expedited briefing schedule.

[8] On October 19, 2009, the Circuit Justice stayed our stay order. *Doe #1 v. Reed*, No.09A356 (U.S. Oct. 19, 2009) (Kennedy, Circuit Justice). The application was thereafter referred to the full Court which confirmed the stay. *Id.* (Oct. 20, 2009). Noting in either of those orders affects our consideration of the merits of these appeals.

[2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

[4]** We review the district court's grant of a preliminary injunction for abuse of discretion. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. **[*11]** 2009) (citing *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007)). A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Am. Trucking*, 559 F.3d at 1052). Thus, application of an incorrect legal standard in granting preliminary injunctive relief or with regard to an underlying issue is grounds for reversal. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003) (citation omitted).

ANALYSIS

We are presented with the novel questions of whether referendum petition signatures are protected speech under the First Amendment and, if so, what level of scrutiny applies to government action that burdens such speech. For the purposes of our analysis, we assume, as did the district court, that the act of signing a referendum petition is speech, such that the First Amendment is implicated.[9] *See First Nat'l Bank*

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[9] The State contends, with some force, that signing a referendum petition is not speech, but is instead, a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution. *See State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) ("'A referendum . . . is an exercise of the reserved power of the people

of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (noting that when a litigant challenges a statute on First Amendment grounds, the threshold question **[*12]** is whether the statute burdens expression the First Amendment protects). Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the PRA to strict scrutiny.

I. District court's analysis

The district court's analysis was based on the faulty premise that the PRA regulates anonymous political speech. The signatures at issue, however, are not anonymous. First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition. Second, each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers. Third, any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise. In fact, the PRA provides to the contrary. Fourth, Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process. Thus, the district court's finding that the

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to legislate . . . .'" (quoting *Belas v. Kiga*, 959 P.2d 1037, 1040-41 (Wash. 1998))). Because we assume, for purposes of this case, that signing a referendum petition is speech, we do not reach this argument and intimate no view on it.

speech at issue is anonymous is clearly erroneous.[10] And, because it was based on [*13] that faulty premise, the district court's application of anonymous speech cases requiring strict scrutiny was error.

To the extent the district court did not rely exclusively on anonymous speech cases, the district court nonetheless erred in applying strict scrutiny. Relying on *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988), and *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 197 (1999), the district court concluded that petition signing, like petition circulation, is protected political speech, and suggested that any regulation of protected political speech is subject to strict scrutiny. This suggestion is unsupported by the applicable case law. Even assuming, as we do here, that petition signing is protected political speech, it does not follow that a regulation that burdens such speech is necessarily subject to strict scrutiny. *See e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (applying intermediate scrutiny for viewpoint- and content-neutral time, place, and manner restrictions on speech); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying balancing test to election restriction that burdened First Amendment rights); *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th [*14] Cir. 2002) ("[T]he level of constitutional scrutiny that we apply to a statutory restriction on

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[10] This appears to be more an assumption than a finding. All that the (continued...) (...continued) district court "found" on this issue was that "at this time, the Court is not persuaded that waiver of one's fundamental right to anonymous political speech is a prerequisite for participation in Washington's referendum process." All of the facts underlying this finding are undisputed. We have, nonetheless, applied the deferential clear error standard of review to this finding.

political speech and associational freedom is dictated by both the intrinsic strength of, and the magnitude of the burden placed on, the speech and associational freedoms at issue.").

II. Applicable level of scrutiny

[5]** Having concluded that the district court's basis for applying strict scrutiny was in error, we turn to the PRA and determine what standard should be applied. As noted above, not all laws that burden First Amendment rights are subject to strict scrutiny. A regulation that has an incidental effect on expressive conduct is constitutional as long as it withstands intermediate scrutiny. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008).

In *O'Brien*, a student was arrested for burning his draft card in protest of the Vietnam War. 391 U.S. at 369-70. The student argued the statute was an unconstitutional infringement upon his right to engage in political speech. *Id.* at 370. The Supreme Court first assumed that "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment." *Id.* at 376. The Court then concluded that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental **[*15]** interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. Applying intermediate scrutiny, the Court concluded that the draft card statute was not unconstitutional as applied to O'Brien. *Id.* at 377. As in *O'Brien*, we assume for the purposes of our analysis that signing a referendum petition has a "speech" element such that petition signing qualifies as expressive

conduct. We also assume that the PRA's public access provision has an incidental effect on referendum petition signers' speech by deterring some would be signers from signing petitions. Given these assumptions, we conclude that intermediate scrutiny applies to the PRA.[11]

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[11] We note that "election regulations" are subject to a different analysis altogether. Instead of applying *O'Brien* intermediate scrutiny, courts apply a balancing test to determine whether an election regulation is a permissible infringement on First Amendment free speech rights. *See Caruso v. Yamhill County ex rel. County Comm'r*, 422 F.3d 848, 859 (9th Cir. 2005) (when an election regulation imposes only "reasonable, nondiscriminatory" restrictions upon First and Fourteenth Amendment rights, "the [s]tate's important regulatory interests are generally sufficient" to justify the restrictions) (quoting *Burdick*, 504 U.S. at 434); *see also Burdick*, 504 U.S. at 434 (holding that only when the regulation subjects such rights to severe restrictions must it be narrowly drawn to advance a compelling state interest). We assume, however, that the PRA is not an election regulation. No case offers a sound definition of an election regulation, and its meaning is not entirely discernible. However, Justice Thomas, in his *Buckley II* concurrence, provides examples of cases that would likely be election regulation cases, *see* 525 U.S. at 207, and none of them seems to parallel the current case. For example, Justice Thomas cites *Burson v. Freeman*, 504 U.S. 191, 198 (1992), wherein the Court subjected to strict scrutiny a Tennessee law prohibiting (continued...) (...continued) solicitation of voters and distribution of campaign literature within 100 feet of the entrance of a polling place. *Id.* He also cited *Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983), which dealt with a challenge to an Ohio regulation that imposed a filing deadline for independent candidates. *Id.* He cited several other cases. *See e.g. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Meyer*, 486 U.S. at 421. *Id.* at 206-07. All of these cases, however, dealt with regulations that were content-based; they all dealt directly and specifically with the election process. The PRA, on the other hand, only incidentally deals with the election process and only has attenuated consequences. It does not

[*16] Under intermediate scrutiny, as articulated in *O'Brien*, application of the PRA to referendum petitions is constitutional if the PRA is within the constitutional power of the government to enforce, it furthers an important government interest unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than necessary to justify the interest. *O'Brien*, 391 U.S. at 377; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

III. Constitutionality of the PRA

Applying *O'Brien*, we begin by noting that Plaintiffs do not contend that "aside from its impact on speech, [the PRA] is beyond the constitutional power of the [State] to enforce." *See Clark*, 468 U.S. at 298-99. We thus turn next to the government interests the PRA furthers. The State has asserted two interests: (1) **[*17]** preserving the integrity of the election by promoting government transparency and accountability; and (2) providing Washington voters with information about who supports placing a referendum on the ballot. Both interests plainly qualify as important.[12]

[6]** "A [s]tate indisputably has a compelling interest in preserving the integrity of the election process." *Eu v. S.F. County Democratic Cent. Comm.*,

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prevent the petition signers from signing the petitions or from otherwise lawfully qualifying their referendum for a vote. At most, it *might* deter *some* voters from signing the petition.

[12] In making its strict scrutiny analysis, the district court recognized only one of these interests, "preserving the integrity of its election process," as a "compelling governmental interest." It did not address the State's interest, furthered by the PRA, of an informed electorate.

489 U.S. 214, 231 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)); *see also Buckley II*, 525 U.S. at 191 ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process . . . ."). In Washington, the PRA plays a key role in preserving the integrity of the referendum process by serving a government accountability and transparency function not sufficiently served by the statutory scheme governing the referendum process. The oversight procedure provided by statute allows the Secretary of State to limit observers to two opponents and two proponents of the referendum. *See* Wash. Rev. Code § 29A.72.230. This procedure is insufficient to shift oversight from the special interest groups to the general public. *See Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994) ("Without tools such as **[*18]** the [PRA], government of the people, by the people, for the people, risks becoming government of the people by the bureaucrats, for the special interests."). Without the PRA, the public is effectively deprived of the opportunity independently to examine whether the State properly determined that a referendum qualified, or did not qualify, for the general election.

Moreover, the PRA is necessary for citizens to make meaningful use of the state superior court challenge also provided by statute. *See* Wash. Rev. Code § 29A.72.240.[13] The superior court procedure would be at

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[13] That statute provides:

> Any citizen dissatisfied with the determination of the secretary of state that . . . [a] referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requir-

best inefficient and at worst useless, if citizens have no rational basis on which to decide whether they are "dissatisfied" with the Secretary of State's determination before filing a challenge – and they cannot gain that understanding without the right to inspect the petition sheets.

[*19] We have also recognized the State's "informational interest" as important. *See Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 nn.8-9 (9th Cir. 2007) (noting that the informational interest was "well-established" and that California presented persuasive evidence demonstrating that it was compelling); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032 (9th Cir. 2009) (having "little trouble" concluding that the state's informational interest was important).

Plaintiffs correctly note that *Cal. Pro-Life* and *Canyon Ferry* dealt with the interest in disclosure of financial backers of referenda, not "generally what groups may be in favor of, or opposed to, a particular . . . ballot issue." *Canyon Ferry*, 556 F.3d at 1032-33 (holding that requiring disclosure of *de minimus* in-kind contributions was unconstitutional because the marginal informational gain did not justify the burden of disclosure). Referendum petition signers, however, cannot be considered "generally" in favor of a particular ballot issue. Referendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect. The

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ing the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the . . . petition, or for an injunction to prevent the certification thereof . . . .

Wash. Rev. Code § 29A.72.240.

interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot issue.

[*20][7]** We conclude that each of the State's asserted interests is sufficiently important to justify the PRA's incidental limitations on referendum petition signers' First Amendment freedoms. *See O'Brien*, 391 U.S. at 376-77. We conclude also that the incidental effect of the PRA on speech is no greater than necessary. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (holding that a restriction need not be the least restrictive means of furthering the State's interest to survive intermediate scrutiny).

Finally, no one has claimed that the State's interests are at all related to the suppression or regulation of expression. The stated aim of the PRA, which itself was passed through the initiative process, is to keep the citizens "informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030. There is no indication that despite this clear statement, the PRA was nonetheless intended to suppress free expression.

Accordingly, we hold that the PRA as applied to referendum petitions does not violate the First Amendment.[14]

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[14] Because we conclude that Plaintiffs have failed to satisfy the first *Winters* factor – likelihood of success on the merits – we need not examine the three remaining *Winters* factors, *see supra* at 10 (quoting the four-factor *Winters* test), although we note that the district court's analysis of the remaining *Winters* factors relied on presumptions, rather than findings of fact, arising from its erroneous legal conclusion that Plaintiffs' First Amendment rights were likely violated.

[*21] CONCLUSION

The district court applied an erroneous legal standard when it applied strict scrutiny to the PRA. The proper analysis was to apply intermediate scrutiny. Applying this analysis, we conclude that the PRA is constitutional as applied to referendum petitions.

The district court's grant of the preliminary injunction is

REVERSED.

[Order List 558 U.S. ___, Oct. 20, 2009]

SUPREME COURT
OF THE UNITED STATES

JOHN DOE #1, et al., Applicants,	)	
v.	)	No. 09A-356
SAM REED, et al.,	)	

ORDER IN PENDING CASE

The application presented to Justice Kennedy and by him referred to the Court is granted. The order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, entered October 15, 2009, is hereby stayed. The September 10, 2009 order of the United States District Court for the Western District of Washington, case No. C09-5456BHS, granting the motion for preliminary injunction shall remain in effect pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Stevens would deny the application.

[Case No. 09A356, Oct. 19, 2009]

SUPREME COURT
OF THE UNITED STATES

JOHN DOE #1, et al., Applicants,	)	
v.	)	No. 09A-356
SAM REED, et al.,	)	

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the order of the United States Court of Appeals for the Ninth Circuit, case Nos. 09-35818, 09-35826, and 09-35863, issued October 15, 2009, which stayed the district court's order granting a preliminary injunction, is hereby stayed. The September 10, 2009, order of the United States District Court for the District of Washington, case No. C09-5456BHS, therefore remains in effect pending further order of the undersigned or of the Court.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

[Doc. 63, filed September 10, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, et al., Plaintiffs,	)	
v.	)	
SAM REED, et al., Defendants,	)	
and	)	Case No. C09-5456BHS
WASHINGTON COALITION FOR OPEN GOVERNMENT, Defendants-Intervenors,	)	The Honorable Benjamin H. Settle
and	)	
WASHINGTON FAMILIES STANDING TOGETHER, Defendants-Intervenors.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on the Plaintiffs' motion for preliminary injunction (Dkt. 3). The

Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file, and hereby grants the motion for the reasons stated herein.

I. BACKGROUND

A. PROCEDURAL BACKGROUND

On July 28, 2009, Plaintiffs filed a complaint and motion for temporary restraining order and preliminary injunction, seeking to enjoin the Secretary of State of Washington ("Secretary of State") from any public release of documents showing the names and contact information of those individuals who signed petitions in support of Referendum **[*2]** Measure No. 71 ("R-71"). Dkts. 2 (Plaintiffs' Complaint) and 3 (Motion for Temporary Restraining Order and Preliminary Injunction).

In Count I of the complaint, Plaintiffs allege that the Washington Public Records Act, RCW 42.56.001, violates the First Amendment as applied to referendum petitions because the act is not narrowly tailored to serve a compelling governmental interest. Dkt. 2 at 10. In Count II, Plaintiffs allege that the Public Records Act is unconstitutional as applied to R-71 because "there is a reasonable probability that the signatories of the R-71 petition will be subjected to threats, harassment, and reprisals." *Id.*

On July 29, 2009, the Court granted Plaintiffs' motion for temporary restraining order, scheduled a preliminary injunction hearing for September 3, 2009, and set a briefing schedule. Dkt. 9. On August 14, 2009, Defendants filed a response. Dkt. 25. On August 21, 2009, Plaintiffs filed a reply. Dkt. 31. The Court held a preliminary injunction hearing on September 3,

2009. Dkt. 62.

At the hearing, the Court entered the following rulings: (a) Pursuant to Federal Rule of Civil Procedure 24(b) (permissive intervention), the Court granted the motions to intervene filed by Washington Families Standing Together ("WFST") and Washington Coalition for Open Government ("WCOG"); (b) the Court denied the motion to intervene filed by Mr. Arthur West because no motion was on the docket; and (c) the Court denied Plaintiffs' motion to consolidate the preliminary injunction hearing with a trial on the merits. Dkt. 62.

B. WASHINGTON'S REFERENDUM PROCESS

In Washington, while legislative authority is vested in the state legislature, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, § 1 and 1(b).[1] A referendum petition against any bill passed by the legislature must be filed with the Secretary of State within 90 days after **[*3]** adjournment of the legislative session at which the bill was enacted. *Id.*, § 1(d); RCW 29A.72.160; *see also* WAC 434-379-005 (filing of proposed referendum with Secretary of State).

In order to initiate the referendum process, the state constitution requires the filing of petitions with the Secretary of State that contain the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the Secre-

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[1] The state constitution provides some exceptions to the people's power to reject laws passed by the legislature that do not apply in this case.

tary of State. Wash. Const., art II, § 1(b); *see also* RCW 29A.72.150. Referendum petition sheets must include a place for each signer to sign and print his or her name, and the address, city, and county at which he or she is registered to vote. RCW 29A.72.130.

Once the referendum petition has been filed, the Secretary of State verifies and canvasses the names of the legal voters on the petition. RCW 29A.72.230. The signature on a petition sheet must be matched to the signature on file in state voter registration records. WAC 434-379-020. In order to determine whether a petition is valid, the Secretary of State may employ statistical sampling techniques. RCW 29A.72.230; WAC 434-379-010. In addition, under state statute,

> [t]he verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides.

Id.

Upon completion of this verification and canvassing process, the Secretary of State must issue a determination as to whether a referendum petition does or does not contain the requisite number of valid signatures. *See* RCW 29A.72.240. Any citizen dissatisfied with the

Secretary of State's determination may file an action in state superior court for a citation requiring the Secretary of State to submit the petition to the state court "for **[*4]**examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be." *Id.* Within five days of the state superior court's decision, the party may seek review by the Washington Supreme Court. *Id.*

If it is ultimately determined that a petition contains the requisite number of valid signatures, the referendum is submitted for vote at the next general election. Wash. Const., art. II, § 1(d).

C. WASHINGTON'S PUBLIC RECORDS ACT

Washington's Public Records Act generally makes all public records available for public inspection and copying. RCW 42.56.070.[2] The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency." RCW 42.56.010(2). The Public Records Act provides that "[i]n the event of conflict between the provisions of [the Public Records Act] and any other act, the provisions of [the Public Records Act] shall govern." RCW 42.56.030. Exemptions to the Public Records Act must either be included in the act itself, or clearly expressed in another statute. RCW 42 56.070(1).

The Public Records Act also contains the following

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[2] While the Public Records Act exempts specific categories of records from public disclosure, the parties appear to agree that no exemption applies in this case.

language:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030.

[*5] D. OTHER RELEVANT STATE LAW

Under RCW 29A.08.720(2), "poll books, precinct lists, and current lists of registered voters are public records and must be made available for public inspection and copying under such reasonable rules and regulations as the county auditor or secretary of state may prescribe."[3] State law provides certain "fundamental rights" for voters, including "the right of absolute secrecy of the vote." RCW 29A.04.206(2). In addition, "no voter may be required to disclose political faith or adherence in order to vote." *Id.*

The parties have not identified any Washington State law that specifically addresses whether personally identifying information provided by the signers of referendum petitions may be publicly disclosed.

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[3] It is unclear whether records of voter signatures are available to the public.

E. REFERENDUM MEASURE NO. 71

On May 18, 2009, the Washington Governor signed Engrossed Second Substitute Senate Bill 5688 ("SB 5688"). This bill expands the rights, responsibilities, and obligations accorded state-registered domestic partners to be equivalent to those of married spouses.

On or about May 4, 2009, Larry Stickney, the Campaign Manager for Protect Marriage Washington ("Protect Marriage"), filed notice with the Secretary of State of his intent to circulate a referendum petition on SB 5688. Dkt. 2 at 4 (Verified Complaint). The proposed referendum was assigned the title R-71 by the Secretary of State. If referred to the next general election ballot, R-71 would ask voters to either accept or reject SB 5688.

On May 13, 2009, Protect Marriage was organized as a state political action committee pursuant to RCW 42.17.040. *Id.* According to Plaintiffs' complaint, Protect Marriage's major purpose is to collect the requisite number of signatures necessary to place R-71 on the ballot and to encourage Washington voters to reject SB 5688. *Id.*

On July 25, 2009, Protect Marriage submitted a petition containing over 138,500 **[*6]** signatures to the Secretary of State for verification and canvassing. *Id.* at 7. According to Nick Handy, Director of Elections for the Secretary of State, the petition sheets were delivered in an "open, public forum," with R-71 supporters and opponents in attendance. Dkt. 26 at 2 (Declaration of Nick Handy). The Elections Division began the process of counting and verifying individual signatures shortly after the petition sheets were filed. *Id.* at 3.

The petition appears to conform with Washington state's formatting requirements set out in RCW

29A.72.130 and contains the following language:

> To the Honorable Sam Reed, Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. 71 . . . shall be referred to the people for their approval or rejection at the regular . . . election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally received this petition, I am a legal voter for the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Dkt. 27 at 2 (Declaration of Catherine S. Blinn); *id.*, 3-12 (Exhibit A) (R-71 petition).

In addition, as required by RCW 29A.72.140, the petition contains a warning that: "Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by a fine or imprisonment or both." *Id.*

The petition included a table, which requested the following information: (1) the printed name of the registered voter, (2) the signature of the voter, (3) the voter's home address, (4) the voter's city and county, and (5) the voter's email address. Dkt. 27 at 4. The petition indicated that inclusion of the voter's email address was "optional." *Id.*

As of August 20, 2009, the Secretary of State has

received public record requests of the Referendum 71 petition from the following individuals or entities: (1) Brian Murphy of WhoSigned.org (Dkt. 23 at 10); (2) Toby Nixon, President of the Washington Coalition for Open Government (*id.* at 12); (3) Arthur West (*id.* at 14); (4) Brian Spencer, **[*7]** on behalf of Desire Enterprises (Dkt. 30 at 9); and (5) Anne Levinson, on behalf of Washington Families Standing Together (*id.* at 11).[4]

On or about June 9, 2009, the groups Whosigned.org and KnowThyNeighbor.org issued a joint press release, stating that the groups intended to publish the names on the internet of every individual signing the Referendum 71 petition. Dkt. 2 at 6; *see* Dkt. 4-5 (Exhibit 4). Plaintiffs maintain that some of the public record requesters have publicly stated that they intend to publish the names of the petition signers on the internet and make the names searchable. *Id.* Plaintiffs also claim that the purpose of placing the names on the internet is to "encourage individuals to contact" and to have a "personal and uncomfortable conversation" with any person who signed the petition. *Id.*; Dkt. 3 at 9.

II. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

As a threshold matter, the following opinion addresses only an individual's right to participate in a political process and the government's authority to intrude on that right. Once narrowed to these two issues, the Court finds it unnecessary to address the content of SB 5688 or the content of R-71.

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[4] Ms. Levinson's request excluded "any and all information subject to [this Court's July 29, 2009] temporary restraining order" (Dkt. 30-11) which restrained Defendants from releasing "the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition" (Dkt. 9 at 4).

Here, pursuant to the Washington Public Records Act, Defendants requested that the Secretary of State disclose the contents of petitions filed to refer R-71 as a measure for the next ballot, a proposed measure to undo SB 5688. Plaintiffs argue that such disclosure would be unconstitutional, as it would violate their fundamental right to free speech. The issue before the Court is limited to whether Plaintiffs have such an individual right and, if so, whether the government is entitled to intrude on that right in this instance.

[*8] A. PRELIMINARY INJUNCTION STANDARD

The basic function of injunctive relief is to preserve the status quo pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that a balance of the equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). Traditionally, injunctive relief was also appropriate under an alternative "sliding scale" test. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). However, the Ninth Circuit overruled this standard in keeping with the Supreme Court's decision in *Winter*. *American Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding that "[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable").

1. Likelihood of Success

Plaintiffs contend that it is unconstitutional for Defendants, acting under authority of the Public Records Act, to comply with public record requests for referendum petitions that contain identifying information of those who support referral of a referendum to the next ensuing general election. Dkt. 3 at 9. Plaintiffs argue that releasing these petitions and the information contained therein would violate the signers' fundamental, First Amendment right to freedom of speech. *Id.* at 9-10. To succeed on this motion for preliminary relief, Plaintiffs must first establish that it is likely that supporting the referral of a referendum should be considered protected political speech.

a. Individual Right

Plaintiffs assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. *Id.* **[*9]** The type of free speech in question is anonymous political speech. As the Honorable Thomas S. Zilly, United States District Judge, has previously stated:

> The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. *See generally [McIntyre v. Ohio Elec-*

> *tions Comm'n*, 514 U.S. 334, 341-342, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995)]. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.
>
> When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the "core" or "essence" of the First Amendment. *See McIntyre*, 514 U.S. at 346-47.

Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001).

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. amend. I.[5] The Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process. *See e.g., Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999) (invalidating, on First Amendment Grounds, a Colorado statute that required initiative petition circulators to wear identification badges); *McIntyre*, 514 U.S. at 357 (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature, holding that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent prac-

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[5] The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. People of the State of California*, 283 U.S. 359, 368, 51 S. Ct. 532 (1931).

tice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority."); *Talley v. California*, 326 U.S. 60, 65, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) (invalidating a California statute prohibiting the distribution of "any handbill in any place under any circumstances" that did not contain the name and address of the **[*10]** person who prepared it, holding that identification and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance").

In this case, the Court must determine whether it is likely that referendum petitions that were submitted to the Secretary of State should be considered protected political speech. Defendants argue that petition signers waived any First Amendment protections because the signers supported the referral of the referendum in an open and public forum. Dkt. 25 at 7-10. But Defendants have neither cited nor submitted any authority in support of this proposition. Moreover, the Court is unaware of any authority, including the Washington Constitution or RCW Chapter 29A.72, which stands for the proposition that signatures in support of a referral must be obtained in a public forum. Therefore, at this time, the Court is not persuaded that waiver of one's fundamental right to anonymous political speech is a prerequisite for participation in Washington's referendum process.

Defendants do assert that Washington's Constitution requires public disclosure of the personally identifying information provided when a person signs a referendum petition. Dkt. 25 at 8. But Washington's Constitution states only that "all such petitions shall be filed with the secretary of state," and it does not state that the information contained on the petition

must also be considered public infor mation. *See* Wash. Const., art. II, § 1(d). In fact, both the Supreme Court and the Washington Supreme Court have previously held that an initiative process falls within the protections of political speech. *Meyer v. Grant*, 486 U.S. 414, 421, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Alderwood Associates v. Washington Environmental Council*, 96 Wn.2d 230, 239 ("It is undisputed that gathering initiative signatures in some manner, at some place, is a constitutionally guaranteed practice. It is at the core of both the First Amendment and Const. art. 1, s 5.").

Defendants also argue that participation should not be considered protected political speech because the petition signers act as quasi-legislators. Dkt. 25 at 10-11. Defendants reason that because the referendum and initiative processes are reserved powers by the people to legislate, the petition signer acts like a legislator with such action **[*11]** being inherently public. *Id.* To support this argument, Defendants rely on *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 808, 982 P.2d 611 (1999), and *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). Dkt. 25 at 10. But both of these cases are distinguishable. First, the *Heavey* court addressed the question of whether a writ of mandamus should issue against a state officer when the officer defended the constitutionality of a referendum. 138 Wn.2d at 803-804. While the *Heavey* court did state that referendum and initiative measures involve the people in their legislative capacity, it was only to note that such legislation "remain[s] subject to the mandates of the Constitution." *Id.* at 808. The court did not hold that a "quasi-legislative" action requires waiver of a funda-

mental right to anonymous political speech.

Second, in *Amalgamated Transit Union Local 587*, the court addressed a challenge to the constitutionality of a statute enacted through the initiative process. 142 Wn.2d at 193-199. The court did not address the issue of the political nature of the initiative process itself. Therefore, the Court is not persuaded by Defendants' "quasi-legislative" arguments.

In this case, it is important to note that the Court is unaware of any authority that is directly on point for the question before the Court. The weight of authority, however, counsels toward the finding that supporting the referral of a referendum is likely protected political speech. For example, in *Meyer*, the Court noted that, of necessity, "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421. In fact, the Court explicitly stated that the "record in this case demonstrates that the circulation of appellees' petition involved political speech." *Id.*, n.4. Moreover, in *Buckley*, the Court held that petition circulation is "core political speech," because it involves "*interactive* communication concerning political change." 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 422) (emphasis added). The *Buckley* Court also noted that "First Amendment protection for such *interaction* . . . is at its zenith." *Id.* at 187 (internal quotations omitted) (emphasis added). It would seem that if the circulator is protected by **[*12]** the First Amendment and the process is at the core of the First Amendment, then the people singing the petition in support of referral of the referendum would also be entitled to the protections of the First Amendment. In fact, the *Buckley* Court touched upon the protection of

the "interaction" in the circulation process, which involved a "political conversation" and the "exchange of ideas." *Id.* at 192. By necessity, an interaction involves the circulator as well as one who may support the referral of a referendum. Based on these authorities, the Court finds that it is likely that an individual who supports the referral of a referendum is entitled to protection under the First Amendment.

Therefore, the Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously. The next step in the Court's analysis is based on the fact that the right to freedom of speech is not absolute.

The Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 187 (quoting *Storer v. Brown*, 415 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). In other words, the government is not without an interest in the integrity of the referendum process. As such, the government may infringe on an individual's right to free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling governmental interest. *See McIntyre*, 514 U.S. at 346-47 (holding that governmental restrictions on core political speech are entitled to "exacting" scrutiny, and upheld only where they are narrowly tailored to serve an overriding state interest.").[6]

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[6] Some of the relevant cases discuss a level of review called "exacting" scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (a compelled disclosure

[*13] b. Governmental Interest

Under a strict scrutiny analysis, the Court must first identify the asserted compelling governmental interest. In this case, Defendants argue that "[a] state indisputably has a compelling interest in preserving the integrity of its election process." Dkt. 25 at 17 (citing *Eu v. San Francisco Cy. Democratic Cent. Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 1024, 103 L. Ed. 2d 271 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761, 93 S. Ct. 1245, 1251-52, 36 L. Ed. 2d 1 (1973))). The Court agrees with Defendants on this point as it is undisputed that the State must employ some measures to prevent fraud in the referendum process. What is disputed, however, is the extent of the government intrusion on the individual's right to anonymously participate in a political activity, i.e., whether the Public Records Act is narrowly tailored to accomplish the interest of preserving the integrity of the referendum process.

It is important to reiterate two points: (1) for the purposes of preliminary relief, the Court must determine only whether Plaintiffs are likely to succeed on the merits of their claim (*see Winter, supra*); and (2) Plaintiffs are only challenging the Public Records Act that requires disclosure of public documents and are not challenging the requirement of RCW 29A.72.130

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case). But "exacting" scrutiny is "strict" scrutiny. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (citing *First Nat'l Bank of Boston v. Bellotti*, 436 U.S. 765, 786 (1978) (equating "exacting" scrutiny with "strict" scrutiny). *See also Fed. Elec. Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (reiterating *McIntyre's* holding that "exacting" scrutiny is applied to determine whether the law is narrowly tailored to serve an overriding state interest and applying "strict" scrutiny to a federal campaign statute).

that those who sign in support of referral of the referendum disclose identifying information. Based on the record before the Court, the Court finds that Plaintiffs have established a likelihood of success on the claim that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.

In *Buckley*, the Court addressed a challenge to several statutes that were enacted by Colorado's Legislature that regulated the state's initiative and referendum petition process. *Id.* at 187-189. One particular statute, of relevance to the present matter, required initiative-petition circulators to wear a badge identifying their name. *Id.* at 187. The Court stated that:

> We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made. But the **[*14]** First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore . . . are satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.

Id. (internal citations and quotations omitted). The Court held that the law violated the petition circulators' First Amendment free speech guarantee. *Id.* at 205. In reaching this conclusion, the Court

separated what it considered necessary or proper ballot-access controls from restrictions that unjustifiably inhibit the circulation of ballot initiative petitions. *Id.* at 192-93. The Court noted that evidence was presented that "demonstrated that compelling circulators to wear identification badges inhibits participation in the petitioning process." *Id.* at 197-98 (internal citations omitted).

In this case, the State argues that its "interest in the public availability of the Plaintiffs' names outweighs any alleged First Amendment interest . . . ." Dkt. 25 at 16. The State further argues as follows:

> Absent access to the names of persons who signed referendum petitions, the public would not be able to independently examine whether the State acted properly in determining whether a referendum measure qualified for the ballot. Without access to the names of signers, the public would not be able to even verify the gross number of signatures submitted, whether the State accepted duplicate signatures, or whether the State accepted signatures from persons disqualified from voting. Public access to the signature petitions thus provides an important check on the integrity of the referendum election process.

Dkt. 25 at 17. The State's argument would be more persuasive if there was not a more narrowly tailored signature verification procedure. *See* RCW 29A.72.230

Under RCW 29A.72.230, the Secretary of State must "verify and canvass the names of the legal voters on the petition." The statute also provides for public access to that verification process:

The verification and canvass of signatures on

> the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process.

[*15] *Id.* Moreover, the Washington Supreme Court has held that statutory referendum provisions "evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people . . . ." *State v. Superior Court of Thurston County*, 81 Wn. 623, 647, 143 P. 461 (1914).

In light of the State's own verification process and the State's own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as "an important check on the integrity of the referendum election process." In the alternative, Defendants assert that there exists a second "compelling" interest in favor of disclosure. Dkt. 25 at 17. Defendants argue that the electorate is entitled to know "who is essentially lobbying for their vote, and thus, who likely will benefit from the measure." *Id.* (citing *California Pro-Life Council v. Getman*, 328 F. 3d 1088, 1105-07) (9th Cir. 2003). But this argument is unavailing because neither the Court nor the parties have the ability to identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public. In other words, the identity of the person who supports the referral of a referendum

is irrelevant to the voter as the voting public must consider the content of the referendum and be entitled to a process by which it can ensure that the petitions are free from fraud.

Therefore, the Court finds that Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process.

c. Conclusion - Likelihood of Success

The Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech. The Court also finds that Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the **[*16]** referendum process. Therefore, the Court concludes that Plaintiffs have established that they are likely to succeed on the merits of their claim that the Public Records Act is unconstitutional as applied to the disclosure of referendum petitions. At this time, the Court need not reach the merits of Plaintiffs' second claim for relief.

2. Likelihood of Irreparable Harm in the Absence of Preliminary Relief

Plaintiffs contend that the denial of their request for a preliminary injunction will cause them irreparable harm. Their claim is premised on the argument that their First Amendment right to free speech will be violated, irreparably, if the State complies with the public record request. *See* Dkt. 3 at 29.

"Deprivations of speech rights presumptively constitute irreparable harm for purposes of a prelimi-

nary injunction: 'The loss of First Amendment Freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 547 (1976); *See also Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim; *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."). Because this court finds that referendum petitions are likely to be protected under the First Amendment, Plaintiffs are entitled to the presumption that they will be irreparably harmed absent preliminary relief. Defendants have failed to overcome this presumption.

Therefore, the Court finds that Plaintiffs have established that they are likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of the Equities

In determining whether to grant or deny a motion for preliminary injunction, the court must balance the equities of the respective parties' interests. *Winter, supra*. Where a case raises serious First Amendment questions, a court is compelled to find the po tential **[*17]** for irreparable harm, "or that at the very least the balance of hardships tips sharply in [the moving party's] favor" *Summartano v. First Judicial District Court, in and for County of Carson City*, 303 F. 3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). Because this Court finds that Plaintiffs have established that this case likely raises serious First

Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury, under *Summartano,* this court also finds that the equities tip in favor of the Plaintiffs. *See id.*

4. Public Interest

Plaintiffs argue that granting the preliminary injunction is in the public's interest. In *Sammartano,* the Ninth Circuit Court of Appeals held "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 974. The *Sammartano* court went on to state that the public's interest in protecting First Amendment rights may sometimes be overcome where there is "a strong showing of other competing public interests."

In this case, Defendants have failed to make a strong showing of other competing public interests. Therefore, the Court finds that granting the preliminary injunction is in the public's interest to prevent the likely violation of Plaintiffs' First Amendment rights.

III. ORDER

Therefore, it is hereby

ORDERED that Plaintiffs' motion for preliminary injunction (Dkt. 3) is **GRANTED**.

DATED this 10th day of September, 2009.

/s Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution, article II, §1(b)

The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: Provided, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the

legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

Revised Code of Washington § 29A.68.011

Prevention and correction of election frauds and errors.

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An error or omission has occurred or is about to occur in the official certification of the election.

An affidavit of an elector under subsections (1) and (3) of this section when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the official certification of the election as provided in RCW 29A.60.190, 29A.60.240, or 29A.60.250 or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.

Revised Code of Washington § 29A.72.200

Petitions — Destruction on final refusal.

If no appeal is taken from the refusal of the secretary of state to file a petition within the time prescribed, or if an appeal is taken and the secretary of state is not required to file the petition by the mandate of either

the superior or the supreme court, the secretary of state shall destroy it.

Revised Code of Washington § 29A.72.230

Petitions — Verification and canvass of signatures, observers — Statistical sampling — Initiatives to legislature, certification of.

Upon the filing of an initiative or referendum petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides. The secretary of state may use any statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW. No petition will be rejected on the basis of any statistical method employed, and no petition will be accepted on the basis of any statistical method employed if such method indicates that the petition contains fewer than the requisite number of signatures of legal voters. If the secretary of state

finds the same name signed to more than one petition, he or she shall reject all but the first such valid signature. For an initiative to the legislature, the secretary of state shall transmit a certified copy of the proposed measure to the legislature at the opening of its session and, as soon as the signatures on the petition have been verified and canvassed, the secretary of state shall send to the legislature a certificate of the facts relating to the filing, verification, and canvass of the petition.

Revised Code of Washington § 29A.72.240

Count of signatures — Review.

Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or

injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.

Revised Code of Washington § 29A.84.210
Violations by officers.

Every officer who willfully violates any of the provisions of chapter 29A.72 RCW or RCW 29A.32.010 through *29A.32.120, for the violation of which no penalty is herein prescribed, or who willfully fails to comply with the provisions of chapter 29A.72 RCW or RCW 29A.32.010 through *29A.32.120, is guilty of a gross misdemeanor punishable to the same extent as a gross misdemeanor that is punishable under RCW 9A.20.021.

Revised Code of Washington § 29A.84.230
Violations by signers.

(1) Every person who signs an initiative or referendum petition with any other than his or her true name is guilty of a class C felony punishable under RCW 9A.20.021.

(2) Every person who knowingly signs more than one petition for the same initiative or referendum measure or who signs an initiative or referendum petition knowing that he or she is not a legal voter or

who makes a false statement as to his or her residence on any initiative or referendum petition, is guilty of a gross misdemeanor.

Revised Code of Washington § 29A.84.250

Violations — Corrupt practices.

Every person is guilty of a gross misdemeanor who:

(1) For any consideration or gratuity or promise thereof, signs or declines to sign any initiative or referendum petition; or

(2) Provides or receives consideration for soliciting or procuring signatures on an initiative or referendum petition if any part of the consideration is based upon the number of signatures solicited or procured, or offers to provide or agrees to receive such consideration any of which is based on the number of signatures solicited or procured; or

(3) Gives or offers any consideration or gratuity to any person to induce him or her to sign or not to sign or to vote for or against any initiative or referendum measure; or

(4) Interferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum petition or with the right to vote for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice; or

(5) Receives, handles, distributes, pays out, or gives away, directly or indirectly, money or any other thing of value contributed by or received from any person, firm, association, or corporation whose residence or

principal office is, or the majority of whose members or stockholders have their residence outside, the state of Washington, for any service rendered for the purpose of aiding in procuring signatures upon any initiative or referendum petition or for the purpose of aiding in the adoption or rejection of any initiative or referendum measure. This subsection does not apply to or prohibit any activity that is properly reported in accordance with the applicable provisions of chapter 42.17 RCW. A gross misdemeanor under this section is punishable to the same extent as a gross misdemeanor that is punishable under RCW 9A.20.021.

Revised Code of Washington § 42.17.010

Declaration of policy.

It is hereby declared by the sovereign people to be the public policy of the state of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

(2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest.

(4) That our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure of their financial and business hold-

ings, provided those officials deal honestly and fairly with the people.

(5) That public confidence in government at all levels is essential and must be promoted by all possible means.

(6) That public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions.

(7) That the concept of attempting to increase financial participation of individual contributors in political campaigns is encouraged by the passage of the Revenue Act of 1971 by the Congress of the United States, and in consequence thereof, it is desirable to have implementing legislation at the state level.

(8) That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act of 1971 by the Congress of the United States, and in consequence thereof it is desirable to have implementing legislation at the state level.

(9) That small contributions by individual contributors are to be encouraged, and that not requiring the reporting of small contributions may tend to encourage such contributions.

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level

must be assured as a fundamental and necessary precondition to the sound governance of a free society.

The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected. In promoting such complete disclosure, however, this chapter shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed.

Revised Code of Washington § 42.56.001

Finding, purpose.

The legislature finds that chapter 42.17 RCW contains laws relating to several discrete subjects. Therefore, the purpose of chapter 274, Laws of 2005 is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.

Revised Code of Washington § 42.56.010(2)
Definitions.

(2) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

Revised Code of Washington § 42.56.070
Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be

explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights

of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating

the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include

all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED

FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

Initiative 276 § 28 (1972)
(codified at RCW 42.17.270 (1973))
(current version at RCW 42.56.080)

Times for Inspection and Copying. Public records shall be available for inspection and copying during the customary office hours of the agency: PROVIDED, that if the agency does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency or its representative agree on a different time.

[Washington Attorney General
Opinion, Aug. 25, 1938]

Initiative and Referendum - Petitions - Inspection by Interested Persons

Olympia, Wash., August 25, 1938

Honorable Bell Reeves, Secretary of State, Olympia, Washington.

Dear Ms. Reeves: I am addressing a letter to you upon an oral request of your employee, Mr. Rosenberg, who informs me that you desire to know whether or not the letter written to your office on June 7th is an

official ruling of this office.

I wish to inform you that it was only an unofficial letter which did not express the opinion of this office, and the ruling made in that letter is hereby overruled. A copy of an opinion of this office under date of March 14, 1938, to The Honorable Cliff Yelle, state auditor, is enclosed which discusses the matter more thoroughly as to what constitutes public records in any office.

We find that the letter of June 7 th was not thoroughly considered as to whether or not initiatory petitions by the people, when filed in your office, are actually public records.

It is the public policy of this state that we uphold the secret ballot in every particular and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied.

This being a new question, it should be finally settled by our supreme court and parties desiring to inspect and copy these records can bring an action in the supreme court securing an order for such purpose. The question is very doubtful in my mind and there is no better opportunity than now to have the matter settled by the supreme court.

We would advise that you refuse to allow the petitions to be inspected or copied.

G.W. Hamilton, *Attorney General*

[Washington Attorney General
Opinion, May 28, 1956]

INITIATIVE PETITION SIGNATURES -- PUBLIC NATURE OF

Signatures on initiative and referendum petitions are not public records. The secretary of state should only permit inspection of such petitions by persons authorized to attend the canvass of the names and prosecuting attorneys contemplating criminal persecutions.

May 28, 1956

Honorable Herb Hanson
State Representative, 39th District
1005 Alice
Snohomish, Washington

Dear Sir:

In your letter of April 30, 1956, you requested our opinion on the following question:

After the secretary of state has counted the signatures on an initiative petition and found it to be sufficient, are the bound volumes of such signatures public records which should be available for public inspection?

In our opinion to regard such signatures as public records would be contrary to public policy.

ANALYSIS

If the secretary of state refuses to file an initiative or referendum and no successful appeal is taken from such refusal, the secretary of state is required by law to destroy the petition. RCW 29.79.180.

Each voter is required to sign in triplicate a registra-

tion card containing his full name and address and listing the precinct in which he is registered. RCW 29.07.090. The third copy of registration cards is filed with the secretary of state.

> " * * * for the sole purpose of, checking initiative and referendum petitions and mailing pamphlets required for constitutional amendments and by the initiative and referendum procedure. They shall not be open to public inspection or be used for any other purpose." (RCW 29.07.130)

Under RCW 29.79.220 the count of signatures on initiative and referendum petitions is made in the same manner as the count of signatures on petitions to the legislature but within sixty days after filing.

RCW 29.79.200 provides in part:

> "Upon filing the volumes of an initiative petition proposing a measure for submission to the legislature at its next regular session, the secretary of state shall forthwith in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to canvass and count the names of the registered voters thereon. * * * "

During the count of the signatures representatives of the public are entitled to be present. We are convinced that this provision in the law is designed to satisfy interested persons that there is an accurate canvass of the names appearing on the petitions.

While there is no specific statute on the precise ques-

tion presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege.

RCW 29.79.240 provides as follows:

> "The secretary of state shall, while making the canvass, keep a record of all names appearing on an initiative or referendum petition which are not registered voters and of all names appearing thereon more than once, and shall report the same to the prosecuting attorneys of the respective counties where the names were signed to the end that prosecutions may be had for such violations of this chapter."

Willful violations of statutes pertaining to signing of initiative petitions carry penalties ranging from gross misdemeanor to felony. RCW 29.79.440 – 470. To permit public access to signatures on initiative petitions would tend to hamper the preservation of evidence essential to secure convictions under these sections.

On August 25, 1938, this office advised the secretary of state as follows (OAG 1938, 377):

"We are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied."

With the exception of representatives of the public entitled to be present during the canvass of the signatures, we reaffirm our previous opinion. We conclude that to regard the names appearing on such petitions

as public records for any purpose other than to assure an accurate canvass and to permit prosecuting attorneys to prosecute violations is contrary to public policy.

We hope the foregoing analysis will prove helpful.

Very truly yours,

Don Easvold
Attorney General

Andy G. Engebretsen
Assistant Attorney General

[A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973]

The Honorable Hubert F. Donahue
Washington State Senator
Route 2 Box 13
Dayton, Washington 99328

Dear Senator Donahue:

I regret that I must refuse to honor your request for copies of those signature petitions supporting Initiative Measure 282 of Thurston County residents.

I wish to make it clear that during the progress of checking signatures, official proponents or opponents are allowed to be present and this courtesy, of course, would be extended to you. However, once the determination has been made as to whether signatures are sufficient or insufficient, then any names revealed to individuals could not, in my judgment, have any legal value.

As you well know, you are entitled to seek an attorney general's opinion if you so wish, but my position

will remain unchanged unless so directed by either the attorney general, the Legislature or the courts.

Sincerely,

/s A. Ludlow Kramer

A. Ludlow Kramer

[A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973]

Secretary of State Lud Kramer denied today a request by State Senator Hubert Donohue (9 th District) to release to him the signature of Thurston County residents signing initiative measure 282.

Secretary Kramer's statement reads as follows:

It has been my policy not to release the names of citizens signing initiative or referendum petitions. As far as I am concerned petitions are not public records and are being held in trust by this office.

I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures have no legal value, but could have deep political ramifications to those signing. I will not violate public trust.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 7 - 2009
OFFICE OF THE CLERK

No. 09-559

In the

Supreme Court of the United States

John Doe #1, John Doe #2, and Protect Marriage Washington,

Petitioners

v.

Sam Reed, Secretary of State of Washington; and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Respondents

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent Washington Families Standing Together's Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether Washington's Public Records Act, which requires disclosure of public records to protect the public interest, violates the First Amendment when applied to require public disclosure of copies of referendum petitions, which are typically signed in public without promise or suggestion of confidentiality and thereafter intentionally submitted to state election officials for the purpose of placing the referendum on the ballot.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, both Washington Families Standing Together ("WAFST") and Washington Coalition for Open Government are Defendants-Intervenors below.

WAFST has no parent corporation and no publicly held company owns any stock in it.

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Brief in Opposition to Petition for Writ of Certiorari for Washington Families Standing Together

I. OPINIONS BELOW

The decision of the court of appeals is reported at ___ F.3d __, 2009 WL 3401297 (9th Cir. Oct. 22, 2009). The district court's order and opinion, which granted a preliminary injunction in favor of Plaintiffs below and was reversed by the court of appeals, is unreported. Pet. App. 23a.[1]

II. JURISDICTION

Respondent WAFST agrees that jurisdiction under 28 U.S.C. § 1254(1) is proper.

III. PERTINENT STATUTES AND RULES

The relevant statutes and rules are included in the appendix to the Petition for Writ of Certiorari ("Petition" or "Pet."). Petitioners claim that Washington's Public Records Act, Chapter 42.56 Wash. Rev. Code, which requires public records to be available to the public, violates the First Amendment (Pet. App. 46a) when applied to required public disclosure of copies of referendum petitions, which are submitted to state election officials for the purpose of placing a referendum on the ballot pursuant to the Washington Constitution, article II, § 1(b) (Pet. App. 46a) and Chapter 29A.72 Wash. Rev. Code.

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed by Petitioners John Doe #1, John Doe #2, and Protect Marriage Washington.

The following are appended because they are not included in the appendix to the Petition: Washington Constitution article II, section 1 (App. 1a); Wash. Rev. Code § 29A.72.010 (App. 5a); Wash. Rev. Code § 29A.72.100 (App. 6a); Wash. Rev. Code § 29A.72.130 (App. 6a); Wash. Rev. Code § 29A.72.150 (App. 8a); Wash. Rev. Code § 29A.72.160 (App. 8a); Wash. Rev. Code § 42.56.030 (App. 9a).

IV. STATEMENT OF THE CASE

A. The Referendum Process in Washington State

Petitioner Protect Marriage Washington ("PMW") was the sponsor and principal proponent of a referendum petition ("Referendum 71") (Pet. App. 29a) that qualified for Washington's statewide election ballot in November 2009. Pet. 2. The John Doe petitioners signed the petition to place Referendum 71 on the ballot and thereafter objected to the public disclosure of copies of the petitions bearing their signatures. Pet. 2.[2]

The Washington Constitution reserves to the people of Washington State the power to require voter approval of any bill adopted by the legislature through the referendum process. Wash. Const. art. II, § 1(b) (Pet. App. 46a). This process begins when referendum proponents file their proposed

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[2] Petitioners do not challenge the constitutionality of Washington's referendum process. Pet. 11. The First Amendment issue raised in this case, however, must be considered in context with the referendum laws in Washington and how they were applied to Referendum 71.

referendum with the Secretary of State, Wash. Rev. Code § 29A.72.010 (App. 5a), and then circulate petitions for signatures of registered voters, Wash. Rev. Code § 29A.72.150 (App. 8a).

The unchallenged referendum petition statute requires the petitions to be in a certain form. In particular, signers must print and sign their names, and state their address, including the city and the county in which they are registered to vote. Wash. Rev. Code § 29A.72.130 (App. 6a). Each referendum petition sheet is to have "lines for not more than twenty signatures," Wash. Rev. Code § 29A.72.100 (App. 6a), and the petition for Referendum 71 had exactly twenty. Pet. App. 29a-30a. Thus, each person who is asked to sign the petition can observe, record, and even copy the names and addresses of the voters who have already signed the same sheet (or attached sheets). Petition gatherers and proponents of the referendum petition are under no obligation to keep the petitions confidential and may use them for fundraising, canvassing, and other political purposes without restriction.

Signatures for the Referendum 71 petitions were gathered in public locations across the State of Washington, including several churches and outside retail stores such as Wal-Mart, Target, and Fred Meyer. ER 068-069.[3]

After gathering a sufficient number of signatures, referendum petition proponents are to file the signed petitions with the Secretary of State

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[3] "ER" refers to the Excerpt of Record filed with the court of appeals.

by no later than 90 days after the final adjournment of the session of the legislature which passed the act. Wash. Rev. Code §§ 29A.72.150, 160 (App. 8a). PMW filed most of its petitions with the Secretary of State by the deadline for filing such petitions. PMW, however, failed to timely file all of the signed petitions it had gathered, and the Secretary of State refused to accept the late-filed petition sheets. PMW's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order, served in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for King County, Case No. 09-2-31908-1 SEA. PMW maintained those rejected, signed petitions in its possession, with no obligation to keep them confidential.[4] Indeed, even with respect to petitions submitted and accepted by the Secretary of State, the proponents were free to make and retain copies of the petitions and to utilize them for fundraising, canvassing, and analysis to help focus their political activity regarding the referendum (or for any other political purpose).

The Secretary of State is tasked with verifying and canvassing the names and signatures on the petitions to ensure that they are of registered voters, to eliminate any duplication and to determine that the minimum number of valid signatures exists to place the measure on the ballot. Wash. Rev. Code § 29A.72.230 (Pet. App.

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[4] In fact, there is no way of knowing whether the John Doe petitioners signed petitions that were actually filed with the Secretary of State—and thus subject to public disclosure—or whether the sheets they signed were part of the group that PMW submitted late and were rejected.

49a). This verification and canvassing process is open to public observation by both proponents and opponents of the referendum petition. *Id.* With Referendum 71, which had generated public interest and media attention, the verification and canvassing stage was also open to members of the media. ER 078-079. Copies of the petitions were thus publicly available during the review process, allowing media and campaign representatives to view individual names, signatures and addresses without obstruction.[5]

Any citizen who disagrees with the Secretary of State's determination on the validity or the number of the petition signatures may apply to Washington superior court for a review of that

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[5] Although the Secretary of State has adopted rules to preclude the observers from recording or disclosing individual names on the petitions during the evaluation process, *see* Declaration of Mona Smith in Support of Plaintiff's Motion for Temporary Restraining Order Ex. A, filed in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for King County, Case No. 09-2-31908-1 SEA, Dkt. # 3B, at least for Referendum 71, the rule was neither effectively nor uniformly enforced. Indeed, the *proponents* of the referendum petition (Petitioners here) violated that very rule by not only taking note of the name of an individual who signed the petition, but by *contacting a relative of that individual*, all in express violation of the Secretary of State's rules. Declaration of Amanda J. Beane in Support of Plaintiff's Motion for Injunctive Relief, Exhibit B: Declaration of Kevin J. Hamilton in Support of Plaintiff's Motion for Temporary Restraining Order ¶ 8, filed in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for Thurston County, Case No. 09-2-02145-4, Dkt. # 7.

determination. Wash. Rev. Code § 29A.72.240 (Pet. App. 50a). The court and parties to such litigation must be able to examine the signatures to determine their validity. If the court determines that the petition contains the required valid signatures, then the referendum is placed on the ballot at the next general election. Wash. Const. art. II, § 1(d) (App. 4a).

B. Washington's Public Records Act

Washington's Public Records Act, Chapter 42.56 Wash. Rev. Code (the "PRA"), mandates that public records be made available for public inspection and copying. Wash. Rev. Code § 42.56.070 (Pet. App. 56a.) The PRA—itself adopted pursuant to Washington's initiative process—is designed to promote transparency in government and access to governmental records. In the words of the statute, "[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030 (App. 9a). This Court has routinely recognized public disclosure is an important interest. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (holding that public disclosure constitutes a substantial government interest on public informational, anti-corruption and record-keeping grounds); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"). Petitioners

acknowledge that the Secretary of State considers referendum petitions filed with the Secretary of State to be part of the legislative process and public records.

C. Petitioners' Action

Soon after PMW filed the signed petitions for Referendum 71 with the Secretary of State, several entities made public records requests for the petitions, pursuant to the PRA. Pet. App. 30a-31a. Later, after it had initiated legal proceedings in superior court challenging the Secretary of State's determination of the validity of signatures for the referendum, WAFST also filed a public records request. WAFST's purpose was to obtain access to sufficient information to determine if there were irregularities relating to the signatures that the Secretary of State had counted.

On July 28, 2009, Petitioners filed a Complaint against Defendants ("Complaint") and a Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion"). The Complaint set forth two causes of action: (1) that the PRA "violates the First Amendment as applied to referendum petitions because the [PRA] is not narrowly tailored to serve a compelling government interest"; and (2) that the PRA "is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." ER 475 at ¶ 62 & 65. The Complaint alleged that the proponents of the Referendum 71 petition, a referendum which sought to repeal a domestic partnership law enacted in Washington State, had

been, or imagined that they would be, subject to various threats and harassment. ER 470 at ¶ 25. The Motion, which sought to enjoin the release of the petitions, was supported by a single declaration—that of Petitioners' own attorney. ER 088-091. This declaration attached exhibits of various websites and newspaper articles, declarations from litigation in California, and opinions from other cases, none of which involve Petitioners.

The district court granted the Temporary Restraining Order ("TRO") on July 29 and, despite the temporal restrictions imposed by Federal Rule of Civil Procedure 65(b), extended its effect for more than a month and ordered that the preliminary injunction hearing take place on September 3. Petitioners then moved to consolidate the preliminary injunction hearing with a trial on the merits; Defendants opposed this motion. On September 1, Petitioners filed three additional declarations in support of their Motion purporting to show that petition signers faced harm if their identities were disclosed, and the identities of the declarants themselves were redacted. ER 024-043.

Before the preliminary injunction hearing, WAFST moved to intervene in the action, having by that time filed its legal challenge to the signature verification and made its PRA request for the petitions. WAFST has an interest in an open and public referendum process and sought the ability to scrutinize the petition signatures for forgery or fraud under the applicable statutes. The district court granted WAFST's intervention motion.

At the preliminary injunction hearing on September 3, the district court entertained oral argument but did not take any testimony. At the conclusion of the hearing, the district court extended the TRO and took the motion for preliminary injunction under advisement, while denying Petitioners' motion to consolidate the preliminary injunction hearing with a trial on the merits (implying that there were further factual issues to be resolved before a permanent injunction should issue). ER 018.

On September 10, the district court granted the preliminary injunction. Pet. App. 23a. The district court held that Petitioners were likely to succeed on the merits of Count I and therefore did not reach Count II. Pet. App. 43a. Defendants and Intervenors appealed from this Order, and after expediting the appeal, the court of appeals reversed. Pet. App. 1a. On October 20, in response to Petitioners' emergency application, this Court stayed the court of appeals' reversal, thus preserving the district court's preliminary injunction to allow consideration of this petition for a writ of certiorari. Pet. App. 21a.

V. REASONS FOR DENYING THE PETITION

The Petition should be denied. This case is a particularly poor vehicle for consideration of the issues raised: the record is notably incomplete, procedurally complicated, and the issue at hand involves neither a Circuit split nor an issue of fundamental importance that would warrant review at this stage.

The vast majority of the Petition is spent arguing that the court of appeals was wrong on the merits. Petitioners, however, fail to explain why the Court should grant the Petition. Petitioners apparently contend that the Court should act as a court of error correction, regardless of whether the case is otherwise proper for a writ of certiorari. With all due respect and for the reasons set forth below, the Petition should be denied.

A. This Case Is a Poor Vehicle for Resolving Whether the Disclosure of Referendum Petitions Complies With the First Amendment

1. The Factual Record Is Limited and Undeveloped and Cannot Support an Inquiry into the Petitioners' Challenges

Petitioners claim that the public disclosure requirement of the PRA as applied to signatures on petitions submitted as part of the State of Washington's referendum process violates the First Amendment. To support this argument, Petitioners assert that disclosure of their signatures compels them to speak, that such compelled speech is subject to strict scrutiny, and that the government's regulation of this speech is not narrowly tailored to a compelling government interest. The resolution of these questions requires a developed factual record that does not exist in this case. The district court granted the preliminary injunction a little over 30 days after Petitioners filed their Complaint, and the record consists of only a handful of declarations untested by cross-examination and most of which involve

unrelated individuals in other states under markedly dissimilar circumstances. None of the Petitioners have been deposed; no discovery has occurred with respect to the Petitioners' own use of the copies of the petitions they retained; and no discovery has occurred with respect to the expectations of those signing the petition. Indeed, it is not even clear that the Petitioners here were included on petitions timely filed with the Secretary of State.

In contrast, Supreme Court cases considering as-applied challenges to election and petition processes on First Amendment grounds rely on well-developed records. For example, in *Buckley v. American Constitutional Law Foundation Inc.*—cited heavily by Petitioners—the Court granted certiorari and issued an opinion only *after* discovery, cross-motions for summary judgment and a full bench trial. Throughout its opinion, the Court cited to the well-developed trial record to evaluate First Amendment challenges to three Colorado state petition process regulations. *See* 525 U.S. 182, 193-94, 198 (1999); *see also id.* at 219-220 (O'Connor, J. concurring); *id.* at 229 (Rehnquist, J. dissenting). The majority, a concurring opinion, and the dissenting opinion each found trial testimony crucial in helping to confirm statistical representations, the full extent of the burden imposed on free speech, and the actual chilling effects of each regulation.

Similarly, in *Meyer v. Grant*, a unanimous Court relied extensively on the trial testimony of an appellee to determine whether the act of gathering petition signatures (an activity that is similar to the signing of a referendum petition) was core

political speech. 486 U.S. 414, 421 n.4 (1988). In a case where, as here, it was unclear whether an expressive activity qualified as core political speech, the Court used detailed trial testimony about the nature of the activity to make an informed determination.

Here, crucial factual questions remain unanswered because of the procedural posture of the case.

First, there is almost no evidence as to whether petition signers had any expectation of anonymity when signing. In fact, the limited evidence indicates that the collection of signatures occurred in public locations and on petition forms that on their face publicly disclosed up to 19 *other* names, signatures, and addresses, thus making implausible the suggestion that those who signed had any expectation of anonymity.

Second, there is no evidence on whether anyone, much less a significant number, would have been—or were—discouraged from signing the petitions because of an apprehension of disclosure of the petitions to the public. Indeed, the record demonstrates quite the opposite. PMW was able to collect a sufficient number of signatures to place the referendum on the ballot, demonstrating the absence of any significant or measurable burden on First Amendment rights. At a minimum, the record is significantly undeveloped on this point and, as postured at present, is ill-suited for this Court's consideration of the issue.

Third, the record is woefully incomplete with respect to the centerpiece of PMW's case: the

alleged threats posed to those whose names appear on the petitions and who fear threats or abusive responses from their fellow citizens. The record consists of a small handful of cursory declarations, many of which concern incidents occurring in California or elsewhere. None of the declarants themselves have been deposed, nor have any of the other signatories (much less those who are accused of making harassing or threatening statements).[6] Indeed, it would not be difficult to identify similar statements in the press, on the Web, or elsewhere about virtually *any* issue of public concern, and before this Court considers this issue, it should have a complete record before it.

Given the procedural posture and inadequate record of this case, it is not an appropriate vehicle to decide the First Amendment questions implicated by the Petition.

2. The Issues Presented Have Not Been Addressed by Other Courts

The Petition identifies no opinion from any other court of appeals or state court on point and essentially concedes there is no split of authority regarding the questions presented. Accordingly, not only has this case not been fully developed at the district court level, but the overarching

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[6] Indeed, even the limited record before the lower courts demonstrated the perils of an incomplete record. PMW affidavits suggested threats had been made to force "uncomfortable conversations," but as the court of appeals noted, the full quotation reveals the misleading nature of the partial quotation and the entirely appropriate (and non-threatening) statements. Pet. App. 9a n.4.

question of whether disclosure of referendum petitions violates the First Amendment has not percolated through the federal or state courts. This case is therefore not an appropriate vehicle to decide the constitutionality of disclosing referendum petitions. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (justifying the denial of certiorari because of "the absence of a direct conflict among the Circuits"); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (reaffirming that conflict among lower courts is "[a] principal purpose" of granting certiorari); *United States v. Seckinger*, 397 U.S. 203, 204 (1970) (explaining that grant of certiorari was to rectify "divergent results that the lower courts have reached in construing the same or similar provisions"). Given the far-reaching implications of a ruling, the Court should allow the lower courts to consider these issues in the first instance.[7]

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[7] There is, of course, no urgency at this point for resolving the dispute at hand. At the 2009 general election, Washington voters overwhelmingly passed Referendum 71, thus approving the expanded domestic partnership law enacted by the Washington Legislature. Moreover, allowing other courts to consider the issue in a variety of factual contexts may ultimately make consideration by this Court unnecessary.

B. The Questions Presented Are Not Important Issues of Law That Conflict with the Decisions of This Court

1. The Issues Presented Are Not Important Questions of Federal Law

Although the Petition asserts that the questions presented are important questions of federal law that should be decided by this Court, it does nothing, other than identify the fact that other states have initiative and referendum laws, to support this argument. The fact that other such laws exist in other states cannot possibly be sufficient to establish the type of important question that should be decided by this Court before a proper record has been developed below and before the questions presented have been allowed to percolate through the lower courts.

2. The Court of Appeals' Decision Is Correct and Does Not Conflict with Decisions of This Court

Even if this Court were to reach the merits, certiorari is not warranted because the court of appeals correctly concluded that the district court erred in finding that the speech at issue is anonymous and in applying strict scrutiny. The court of appeals appropriately applied intermediate scrutiny and held that the state had important interests at stake when disclosing referendum petitions under the PRA and that disclosure did not directly burden speech. Thus, even if this Court were to reach the merits (and WAFST submits that it need not do so), the Petition should nonetheless be denied.

a. The Referendum Process Is an Inherently Public Process

The limited record below establishes that the entire referendum process is open to public inspection from beginning to end. Signatures are gathered in public places, and in front of petition circulators, other petition signers and anyone else who may be standing near the petition signer. After a voter signs a petition, other voters may sign on the same page below, and those later signers can see all the information of the previous signers. The referendum petition proponents have no obligation to keep those signatures confidential, and in fact, they cannot keep them private because they are required to submit them to the Secretary of State's office for verification and canvassing. Staff at the Secretary of State's office reviews the signatures, and both proponents and opponents of the referendum petition can observe the process. Additionally, a citizen who is dissatisfied with the Secretary of State's determination can challenge it in court, where the parties can examine the signatures and review the Secretary of State's canvass. Thus, at every step in the process, the signatures are not private and signers can have no reasonable expectation of confidentiality.[8]

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[8] Additionally, whether the petition signers actually had an expectation of anonymity is not developed in the factual record below and, as discussed in Section V(A)(1), that fact is a compelling reason why the Petition should be denied.

b. The PRA Is Constitutional as Applied to Referendum Petitions

Intermediate scrutiny is applied where a regulation has only an incidental effect on expressive conduct. Here the public act of signing a referendum petition is expressive conduct with a speech element, much like burning a draft card in *O'Brien*. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008) (finding school uniforms to be a form of expressive conduct and applying intermediate scrutiny to uphold the school policy); *Bar-Nevon v. Brevard County Sch. Bd.*, 290 Fed. Appx. 273 (11th Cir. 2008) (assuming wearing of jewelry by students to be expressive conduct and applying intermediate scrutiny); *Vlasak v. Super. Ct. of Cal.*, 329 F.3d 683, 690-91 (9th Cir. 2003) (concluding that actions at protest were expressive conduct and applying intermediate scrutiny). Furthermore, the court of appeals correctly concluded that the PRA imposes only an incidental burden on potential petition signers. Pet. App. 14a at *15. Specifically, there is no evidence in the record to conclude any potential petition signers actually refused to sign petitions that they otherwise supported because they were concerned that their signatures might become part of the public record.[9] The court of appeals

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[9] The lack of a record on this issue further illustrates why this case is not appropriate for the Court's review. Moreover, as noted above, the limited record before the Court in fact suggests that few, if any, voters were dissuaded from signing the Referendum 71 petitions for fear of public disclosure since the petition proponents collected a sufficient number of signatures to qualify the measure for the ballot.

accordingly did not err in concluding that the appropriate standard is intermediate scrutiny. Pet. App. 14a at *14.

Under intermediate scrutiny, the PRA as it applies to petitions submitted as part of the referendum process is constitutional if it (1) falls within the constitutional power of the state, (2) furthers an important state interest that is unrelated to the suppression of free expression, and (3) has an incidental restriction on First Amendment rights that is no greater than necessary to justify the interest. *O'Brien*, 391 U.S. at 377; Pet. App. 16a at *16. Under this standard, the PRA as applied to referendum petitions is constitutional.

The State asserted two interests, both of which are unrelated to any alleged suppression of free expression: (1) preserving the integrity of elections by promoting accountability and transparency, and (2) providing information to voters regarding support for placing a referendum measure on the ballot. The court of appeals correctly concluded that these are both important interests, and in fact, that preserving the integrity of elections is a compelling state interest. *See Eu v. San Francisco County Democratic Centr. Comm.*, 489 U.S. 214, 231 (1989). The court of appeals also correctly concluded that the incidental effect of the PRA on speech was no greater than necessary. Pet. App. 19a at *20.

For these reasons, the court of appeals opinion is consistent with this Court's First Amendment jurisprudence. This case is, in any event, simply not an appropriate vehicle for

deciding the First Amendment questions presented given the limited and undeveloped factual record and the lack of decisions from other federal or state courts.

VI. CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

December 4, 2009

APPENDIX

Washington State Constitution

ARTICLE II

LEGISLATIVE DEPARTMENT

SECTION 1 LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he

shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the

measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: Provided, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may

be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: Provided, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election.

Revised Code of Washington § 29A.72.010

Filing proposed measures with secretary of state.

If any legal voter of the state, either individually or on behalf of an organization, desires to petition the legislature to enact a proposed measure, or submit a proposed initiative measure to the people, or order that a referendum of all or part of any act, bill, or law, passed by the legislature be submitted to the people, he or she shall file with the secretary of state a legible copy of the measure proposed, or the act or part of such act on which a referendum is desired, accompanied by an affidavit that the sponsor is a legal voter and a filing fee prescribed under WASH. REV. CODE 43.07.120.

Revised Code of Washington § 29A.72.100

Petitions -- Paper — Size — Contents.

The person proposing the measure shall print blank petitions upon single sheets of paper of good writing quality (including but not limited to newsprint) not less than eleven inches in width and not less than fourteen inches in length. Each petition at the time of circulating, signing, and filing with the secretary of state must consist of not more than one sheet with numbered lines for not more than twenty signatures, with the prescribed warning and title, be in the form required by RCW 29A.72.110, 29A.72.120, or 29A.72.130, and have a readable, full, true, and correct copy of the proposed measure printed on the reverse side of the petition.

Revised Code of Washington § 29A.72.130

Referendum petitions — Form.

Petitions ordering that acts or parts of acts passed by the legislature be referred to the people at the next ensuing general election, or special election ordered by the legislature, must be substantially in the following form:

The warning prescribed by RCW 29A.72.140; followed by:

PETITION FOR REFERENDUM

To the Honorable . . . . . ., Secretary of State of the State of Washington:

We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. . . . . ., filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . . day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

The following declaration must be printed on the reverse side of the petition:

I, ..., swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude

the victim from seeking any other remedy otherwise available under law.

The petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.

Revised Code of Washington § 29A.72.150

Petitions — Signatures — Number necessary.

When the person proposing any initiative measure has obtained signatures of legal voters equal to or exceeding eight percent of the votes cast for the office of governor at the last regular gubernatorial election prior to the submission of the signatures for verification, or when the person or organization demanding any referendum of an act or part of an act of the legislature has obtained a number of signatures of legal voters equal to or exceeding four percent of the votes cast for the office of governor at the last regular gubernatorial election prior to the submission of the signatures for verification, the petition containing the signatures may be submitted to the secretary of state for filing.

Revised Code of Washington § 29A.72.160

Petitions — Time for filing.

The time for submitting initiative or referendum petitions to the secretary of state for filing is as follows:

(1) A referendum petition ordering and directing that the whole or some part or parts of an act passed by the legislature be referred to the people for their approval or rejection at the next ensuing general election or a special election ordered by the legislature, must be submitted not more than ninety days after the final adjournment of the session of the legislature which passed the act;

(2) An initiative petition proposing a measure to be submitted to the people for their approval or rejection at the next ensuing general election, must be submitted not less than four months before the date of such election;

(3) An initiative petition proposing a measure to be submitted to the legislature at its next ensuing regular session must be submitted not less than ten days before the commencement of the session.

Revised Code of Washington § 42.56.030

Construction.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully

protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 7 - 2009
OFFICE OF THE CLERK

NO. 09-559

IN THE SUPREME COURT OF THE UNITED STATES

JOHN DOE #1, JOHN DOE #2, AND
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE,
AND BRENDA GALARAZA, PUBLIC RECORDS OFFICER
FOR THE SECRETARY OF STATE'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECRETARY OF STATE SAM REED'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Public Records Act requires government to make public records available for citizens to inspect. Public records are writings about the conduct of government, and include referendum petitions voters sign to qualify a measure for the ballot. Does the Public Records Act violate petition signers' First Amendment right to anonymous speech by allowing inspection of referendum petitions upon which signers have publicly disclosed their names and addresses to referendum sponsors, signature gatherers, members of the public, and government?

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BRIEF IN OPPOSITION

The Attorney General of Washington, on behalf of Sam Reed, the Washington Secretary of State, and Brenda Galarza, the Secretary of State's Public Records Officer, respectfully requests that the Court deny the petition for a writ of certiorari in this case.

STATEMENT

Washington's Public Records Act (the Act) requires state and local government to make public records available for inspection and copying at the request of members of the public. John Does No. 1 and 2 and Protect Marriage Washington (Sponsors) brought this action to declare that application of the Act to referendum petitions containing the names and addresses of petition signers violates the First Amendment of the United States Constitution, and to enjoin the Secretary of State (Secretary) from releasing referendum petitions pursuant to requests under the Act. The district court held that the Act is subject to strict scrutiny because it requires disclosure of anonymous political speech, and that it does not satisfy the strict scrutiny standard. The Ninth Circuit Court of Appeals reversed, holding that signing a referendum petition is public speech--not anonymous speech. The Ninth Circuit held that the Act is subject to intermediate scrutiny, and that it satisfies that standard.

A. Washington's Public Records Act

The Public Records Act was enacted by the people in 1972, through Initiative Measure No. 276. 1973 Wash. Sess. Laws page nos. 1-31. The Act

declares that the "people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030 (2009). Accordingly, the "people insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.*

The Act defines a "public record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency[.]" Wash. Rev. Code § 42.56.010(2) (2009). Agencies are required to "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070 (2009). Statutory exemptions from disclosure are narrowly construed. Wash. Rev. Code § 42.56.030. Washington courts consistently refer to the Act as a "strongly-worded mandate for open government, requiring broad disclosure[.]" *E.g., Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 199 P.3d 393, 394 (Wash. 2009).

B. Washington's Referendum Process

Under the Washington Constitution, the people of the state reserve the legislative powers of initiative and referendum. Wash. Const. art. II, § 1. State laws are enacted either by the state legislature, or directly by the people through the use of the initiative and referendum powers. A referendum "may be ordered on any act, bill, law, or

any part thereof passed by the legislature" when the legislature refers a bill to the people or when the people file a petition with the requisite number of signatures.[1] Wash. Const. art. II, § 1(b). If the constitutional prerequisites for a referendum are met, the electorate votes on whether to accept or reject the bill passed by the legislature. *Id.*

When the legislature passes a bill that may be subject to referendum, the bill cannot take effect until 90 days after the legislative session is adjourned, during which time the people may trigger a referendum by filing petitions containing the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of a referendum. Wash. Const. art. II, § 1(b), (c). The referendum "petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote." Wash. Rev. Code § 29A.72.130 (2009). The referendum petition sheets signed by the voters must state:

> "To the Honorable . . . . . , Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. . . . . , filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . . . .

---

[1] There are some exceptions to the referendum power, but none of the exceptions are at issue in this case.

> legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . . day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." *Id.*

The petition sheets must warn that: "[e]very person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both." Wash. Rev. Code § 29A.72.140 (2009). Each petition sheet on which signatures are gathered "must consist of not more than one sheet with numbered lines for not more than twenty signatures[.]" Wash. Rev. Code § 29A.72.100 (2009).

Referendum signature petitions are filed with the Secretary. The Secretary must "verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure[.]" Wash. Rev. Code § 29A.72.230 (2009). The Secretary "may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the

verification process." *Id.* During the verification process, observers are prohibited from making a record of the information on the petitions, except upon court order. *Id.*

Anyone "dissatisfied" with the Secretary's decision that a referendum has or has not been signed by an adequate number of legal voters to qualify for the ballot may bring an action in superior court challenging the Secretary's decision. Wash. Rev. Code § 29A.72.240 (2009). Within five days of the superior court's decision, parties may seek review in the Washington Supreme Court. *Id.*

Since referendum signature petitions filed with the Secretary are "writing[s] containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency," they are public records under the Act. Wash. Rev. Code § 42.56.010(2). None of the statutory exemptions from public disclosure apply to referendum petitions. Prior to this litigation, the Secretary has routinely disclosed petitions in response to public records requests.

C. Referendum 71

In 2007, the Washington Legislature created state registered domestic partnerships. 2007 Wash. Sess. Laws page nos. 616-37. A domestic partnership may be formed when "(a) both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older." Wash. Rev. Code § 26.60.030(6) (2009). In 2009, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights,

responsibilities, and obligations accorded state registered same-sex and senior domestic partners.

In May 2009, Protect Marriage Washington began gathering petition signatures for a referendum election on E2SSB 5688. Signature gathering took place in public places, such as outside Wal-Mart and Target stores. The signature gatherers set up tables and asked members of the public walking by to sign the petition sheets. There was interaction among members of the public about whether the petitions should be signed. The Referendum 71 petition sheets each contained 20 lines for signatures. Nothing shielded the names and signatures on the petition sheets, which were readily visible to other people who signed or read the petition.

On July 25, 2009, the proponents of Referendum 71 submitted their signature petitions to the Secretary in an open, public forum. Referendum supporters and opponents were in attendance, as were several members of the news media. The petition sheets were counted and the Secretary of State's Office began the task of verifying the signatures. The Secretary subsequently concluded that Referendum 71 had about 122,000 valid signatures, and certified the measure to the November 3, 2009, general election ballot.

During the signature-gathering process, the organization WhoSigned.org announced that it would file a public records request to obtain the Referendum 71 petitions and post the information from the petitions on the internet. The Secretary subsequently received public disclosure requests from Toby Nixon of Washington Coalition for Open

Government, Arthur West, Brian Spencer on behalf of Desire Enterprises, and Anne Levinson on behalf of Washington Families Standing Together (WAFST). Although a requestor is not required to state the purpose of a public records request, WAFST stated that it sought to review the signed petitions to address legal errors made by the Secretary related to the form and authentication of petitions and the acceptance of certain signers as registered voters.

D. Proceedings In The District Court

On July 28, 2009, the Sponsors filed this action in Federal District Court. The Sponsors alleged that the Public Records Act violated their First Amendment rights, sought a declaration that the Act was unconstitutional, and asked for a permanent injunction. The Sponsors advanced two claims. First, in Count I, the Sponsors asserted that releasing completed signature petitions for any referendum would violate the signers' First Amendment right to anonymous speech. Second, in Count II, the Sponsors asserted that, in any event, releasing Referendum 71 petitions under the Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. The Sponsors did not allege that referendum petitions are not public records, as defined by the Act, or that the petitions are statutorily exempt from disclosure. The Sponsors also did not allege that any part of Washington's laws governing the referendum process violated the Constitution.

On September 10, 2009, the district court granted the Sponsors' motion for a preliminary

injunction based on Count I of the complaint. The district court first considered the Sponsors' likelihood of prevailing on the merits of that Count. According to the district court, the Sponsors "assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. The *type of free speech in question is anonymous political speech*." Pet. 33a (emphasis added). The district court stated that "[t]he Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process." Pet. 34a (citing *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 326 U.S. 60, 65 (1960)). The district court found that the Sponsors "have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." Pet. 38a. Based on this conclusion, the district court held that the Act was subject to strict scrutiny, and that it was not narrowly tailored. According to the district court: "In light of the State's own verification process and the State's own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as an important check on the integrity of the referendum election process." Pet. 42a (internal punctuation omitted). The district court also rejected the State's interest in informing the public of the names of the persons who supported the referendum because no one knows "whether an individual who supports referral of a

referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public." *Id.* Thus, for the district court, "the identity of the person who supports the referral of a referendum is irrelevant to the voter[.]" Pet. 42a-43a.

The district court's conclusion that the Sponsors were likely to prevail on the merits, effectively determined its ruling on the Sponsors' motion for a preliminary injunction. The district court held that "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction[.]" Pet. 43a-44a (internal punctuation omitted). The district court also concluded that "[b]ecause this Court finds that [Sponsors] have established that this case likely raises serious First Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury, this court also finds that the equities tip in favor of the [Sponsors]." Pet. 44a-45a (citation omitted).

Although the district court's order did not directly set out the scope of the injunction, the court granted the injunction based on the Sponsors' Count I claim. In their motion, the Sponsors requested an injunction to enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act. Thus, the preliminary injunction was not limited to Referendum 71 petitions. The district court did not rule on Count II, the Sponsors' claim that, as applied to Referendum 71, the Act violates the First Amendment. Pet. 43a.

E. Proceedings In The Court Of Appeals

The Secretary immediately appealed the preliminary injunction and filed an emergency motion seeking a stay of the preliminary injunction and expedited treatment so the appeal could be resolved before the November 3, 2009, election on Referendum 71.[2] The Ninth Circuit granted the motion for expedited review and, after oral argument on October 15, issued an order reversing the district court, and stating that an "opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order shall be issued expeditiously[.]" Pet. 2a-3a. The Ninth Circuit also ordered that the Secretary's "motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals." Pet. 2a.

On October 16, the Sponsors filed an application with Justice Kennedy to vacate the Ninth Circuit's stay of the preliminary injunction.[3] Following Justice Kennedy's referral of the application, the Court issued an order that the district court's preliminary injunction "shall remain

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[2] Washington Coalition for Open Government and Washington Families Standing Together intervened at the district court and appealed the district court order. The Ninth Circuit consolidated the three appeals.

[3] The Secretary did not release the Referendum 71 petitions after the Ninth Circuit's Order on October 15 because a state court also had issued a preliminary injunction prohibiting release of the Referendum 71 petitions. *Eyman v. Reed*, No. 09-2-02447-0 (Thurston Cy. Wash. Oct. 14, 2009). The state court action is stayed pending the outcome of this case.

in effect pending the timely filing and disposition of a petition for a writ of certiorari." Pet. 21a. "Justice Stevens would deny the application." *Id.*

On October 22, the court of appeals issued its opinion. Pet. 3a. The court of appeals assumed that "the act of signing a referendum petition is speech, such that the First Amendment is implicated." Pet. 11a. "Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the [Public Records Act] to strict scrutiny." Pet. 12a.

The court of appeals held that "the district court's analysis was based on the faulty premise that the [Public Records Act] regulates anonymous political speech." Pet. 12a. The Ninth Circuit rejected the district court's conclusion that signing a referendum petition is anonymous political speech for several reasons. "First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." Pet. 12a. Moreover, "each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers." *Id.* In addition, as the court of appeals observed, "any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise." *Id.* "In fact, the [Public Records Act] provides to the contrary." *Id.* Finally, the Ninth Circuit observed that "Washington law specifically provides that both

proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process." *Id.* Accordingly, the court of appeals concluded that "[t]he district court's application of anonymous speech cases requiring strict scrutiny was error." Pet. 13a.

The Ninth Circuit next rejected the district court's reliance on *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988) and *Buckley II*, 525 U.S. at 197, for the proposition that "any regulation of protected political speech is subject to strict scrutiny." Pet. 13a. According to the court of appeals: "This suggestion is unsupported by the applicable case law" because "it does not follow that a regulation that burdens [protected] speech is necessarily subject to strict scrutiny." Pet. 13a. In this respect, the court of appeals referred to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994), where this Court applied intermediate scrutiny to viewpoint- and content-neutral provisions of federal law that required cable television operators to carry local broadcast stations on cable systems. The court of appeals also pointed to *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), where this Court applied a balancing test, rather than strict scrutiny, to an election law that burdened First Amendment rights by banning write-in voting. Pet. 13a.

Having determined that the district court's application of strict scrutiny to the Act was error, the court of appeals then considered the appropriate constitutional standard. The court assumed that "signing a referendum petition has a 'speech' element such that petition signing qualifies as expressive

conduct" and further "assume[d] that the [Public Records Act's] public access provision has an incidental effect on referendum petition signers' speech by deterring some would be signers from signing petitions." Pet. 14a-15a. In light of these assumptions, the court of appeals concluded that the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968), applies to the Act. Pet. 14a-16a. Applying the intermediate scrutiny test articulated in *O'Brien*, the court of appeals concluded that the Public Records Act furthers important government interests unrelated to suppression of speech, and the incidental effect on speech is no greater than necessary. Pet. 16a.

The court of appeals began its analysis of the government interests furthered by the Act by noting this Court's recognition of a state's "'compelling interest in preserving the integrity of the election process.'" Pet. 16a (quoting *Eu v. S.F. Cy. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). The court of appeals concluded that Washington's Public Records Act "plays a key role in preserving the integrity of the referendum process" by providing government transparency and accountability to the public generally. Pet. 17a. The court of appeals recognized that Washington's statute authorizing two opponents and two proponents of the referendum to view the Secretary's verification of signatures provides oversight by special interest groups, but does not provide oversight by the general public. Pet. 17a; Wash. Rev. Code § 29A.72.230.

The court of appeals then considered the Act's role in enabling the public to "make meaningful use" of state law authorizing Washington citizens to

challenge the Secretary's determination that the petition has sufficient signatures. Pet. 17a; Wash. Rev. Code § 29A.72.240. The court reasoned that without public disclosure, citizens could not inspect petition sheets and rationally determine whether they were dissatisfied with the Secretary's decision. This would render the superior court procedure "at best inefficient and at worst useless[.]" Pet. 17a-18a.

In addition, the court recognized that the State has an important "informational interest" in disclosure. Pet. 18a. The court explained that unlike campaign donors, "[r]eferendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect." *Id.* The public's interest in knowing who has taken legislative action "is undoubtedly greater" than knowing what groups favor or oppose a ballot issue. Pet. 19a.

Based on this analysis, the Ninth Circuit concluded that "each of the State's asserted interests is sufficiently important to justify the [Public Records Act's] incidental limitations on referendum petition signers' First Amendment freedoms," and held that the Act "as applied to referendum petitions does not violate the First Amendment." *Id.* Because the Sponsors failed to meet the first factor for a preliminary injunction—likelihood of success on the merits—the Ninth Circuit found it unnecessary to examine the remaining three factors. *Id.* n.14.

The court of appeals did not address the Sponsors' Count II claim specific to Referendum 71 because the district court based its preliminary

injunction on Count I, and did not did not consider Count II. Pet. 10a n.6.

The Sponsors filed their Petition For A Writ Of Certiorari on November 6, 2009.[4]

REASONS FOR DENYING THE WRIT

The Sponsors devote slightly more than one page of their petition to explaining why the Court should grant certiorari. Pet. 7-8. The bulk of the petition is devoted to arguing that the case satisfies the preliminary injunction standard. Pet. 9-33. Perhaps this is so because the Sponsors believe that their Petition For A Writ Of Certiorari is a mere formality, as the Court effectively made a decision to grant the writ when it issued the Order reinstating the district court's preliminary injunction. However, that Order expressly contemplates that certiorari may be denied because it provides: "Should the petition for a writ of certiorari be denied, this stay shall terminate automatically." Pet. 21a.

There is good reason for this provision. When the preliminary injunction was reinstated, the Ninth Circuit had not issued its opinion. Thus, it was possible that the court of appeal's decision might have required review by the Court. Now that the Ninth Circuit has issued its opinion, it is clear that there is no basis for certiorari. The Ninth Circuit's decision is not in conflict with another decision and there is no confusion in the circuits on the question presented in this case. Nor does this case present an

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[4] On November 3, 2009, Washington voters approved Referendum 71.

important national question that requires review by this Court.

Although the Ninth Circuit has issued its opinion, the Sponsors do not discuss the opinion or explain why intermediate scrutiny is not appropriate. The Sponsors simply argue that the Public Records Act is subject to strict scrutiny because (1) it requires the release of referendum petitions that publicly disclose the signers' identity and belief that Referendum 71 should be on the ballot, and (2) laws relating to referendums are subject to strict scrutiny because referendums constitute core political speech. Both of these notions are incorrect.

The Ninth Circuit's application of intermediate scrutiny is a correct and routine application of the First Amendment. The Sponsors' petition should be denied.

A. The Sponsors' Petition Is Based On Two Incorrect Premises

The Sponsors' petition is based on two premises. The Sponsors' first incorrect premise is that the Public Records Act, the only Act that the Sponsors challenge, requires petition signers to publicly disclose their identity and their belief that Referendum 71 should be placed on the ballot. Pet. 10. In fact, Sponsors disclose this information to the public long before the Public Records Act comes into play. Petition signers publicly disclose this information during the referendum process, pursuant to state laws that the Sponsors do not challenge. Moreover, the Act does not require the Sponsors to disclose any information. Rather, the

Act applies only to government and requires only government to disclose public records.

The Sponsors' second incorrect premise is that the Act is subject to strict scrutiny because all matters relating to referendums, including signed referendum petitions, constitute core political speech, and the Act applies to such petitions. Pet. 17. In fact, content- and viewpoint-neutral statutes of general application that incidentally burden speech, such as the Act, are not subject to strict scrutiny. *Turner Broadcasting*, 512 U.S. at 661-62. The same is true of statutes regulating many aspects of the election process. *Buckley II*, 525 U.S. at 186.

1. The Public Records Act Does Not Require Petition Signers To Disclose Their Identity Or Belief To The Public—Signers Disclose That Information To The Public When They Sign Referendum Petitions

The premise that the Act requires petition signers to disclose their identity and belief to the public is wrong for two reasons.

The first flaw with this premise is the notion that a signer's name and address are only disclosed to the public when a petition is released in response to a public records request. In fact, voters disclose this information to the public when they sign the petition. As the court of appeals correctly explained, "the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." Pet. 12a. The "petition sheet contains spaces for 20

signatures, exposing each signature to view by up to 19 other signers and any number of potential signers." *Id.* Moreover, this signer information is disclosed to the sponsor of the measure, and persons who gather signatures on behalf of the sponsor, and to anyone with whom they choose to share this information.

The Sponsors acknowledge this disclosure to the public, but argue it is not really public disclosure because the sponsor, signature gatherers, and other signers share a common cause. Pet. 11-12. This argument ignores the signature-gathering process. Individuals are asked to read the petition sheets, which openly display the signatures that have been gathered. Although some may choose to sign, other people may oppose the petition. Discussion and reading of the petitions ensures that the names of petition supporters are exposed to persons who do not agree with the cause.

In addition, nothing in Washington law prohibits sponsors, signature gatherers, or other signers from further disclosing or making use of the information for other purposes. For example, in California, petition circulators sought to use the names and addresses of voters who signed a prior petition to qualify a new measure for the ballot. They sought "to use the names and addresses of signers to mail to them blank petitions with a request that they circulate them and return the signed petitions to plaintiffs for filing[.]" *Bilofsky v. Deukmejian*, 177 Cal. Rptr. 621 (Cal. Ct. App. 1981). The circulators also sought to use this information "to mail notices to signers of campaign events and information concerning the progress of the campaign,

and to mail to them additional materials, including solicitations for funds, for purposes consistent with the objective of the campaign." *Id.* California law prohibited using voters' names and addresses on the petitions for any purpose other than qualifying the measure for the ballot. *Id.* There is no similar restriction in Washington. Indeed, a sponsor may sell the list of names and addresses to anyone.

In this case, it appears that the Sponsors did not gather the voters' signatures for the sole purpose of qualifying Referendum 71 for the ballot. The Referendum 71 petitions also had a space for the signers to provide their email addresses, even though state law does not require voters to provide their email addresses, and the Secretary does not use email addresses to verify voters' signatures. Protect Marriage Washington, the sponsor of Referendum 71, converted from a ballot committee to a Political Action Committee (PAC) after the election in November 2009. *See* http://www.pdc.wa.gov/QuerySystem/politicalcommittees.aspx. The PAC is not statutorily prohibited from using information it gathered on the initiative petition while it was a ballot committee. It would not be surprising if the names, addresses, and email addresses are now being used to solicit donations for the PAC. *See id.*

Given that voters publicly disclose their names and addresses when they sign the petition, any remaining associational privacy interest is very limited. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), the Court affirmed a judgment of civil contempt for failure to comply with a court order to produce the names of individuals who stayed at a camp operated by World Fellowship, Inc. According to the Court,

the "individual rights in an associational privacy . . . were here *tenuous at best*." *Id.* at 80 (emphasis added). This was because the records sought were already public. The Court explained that the "camp was operating as a public one, furnishing both board and lodging to persons applying therefor. As to them, New Hampshire law requires that World Fellowship, Inc., maintain a register, open to inspection of sheriffs and police officers." *Id.*; *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 550 (1963) ("the claim to associational privacy in *Uphaus* was held to be 'tenuous at best,' since the disputed list was already a matter of public record by virtue of a generally applicable New Hampshire law requiring that places of accommodation, including the camp in question, maintain a guest register open to public authorities.") (citation omitted).

This case presents an analogous circumstance. Washington laws that the Sponsors do not challenge require voters who seek a referendum to publicly disclose their names and addresses on the referendum petition. The subsequent availability of that information under the Public Records Act thus implicates no significant interest in associational privacy.

In sum, the Sponsors' premise that the Public Records Act requires public disclosure of their identities and beliefs is unsound. Voters disclose that information to the public when, as unchallenged state law requires, they decide to sign a referendum petition.

The Sponsors' premise that the Public Records Act requires them to disclose their identity and belief

to the public is incorrect for a second reason. The Act does not require voters to disclose any information. The Act imposes obligations only on government, requiring government to maintain public records and to disclose them upon request. The Act does not require petition signers to disclose any information to the public or to the government. Voters disclose their names and addresses on referendum petitions to the public and the government as a consequence of state election laws that the Sponsors do not challenge. Indeed, the Act does not impose any obligations on voters at all.

2. Laws Governing Initiatives And Referendum Are Not Always Subject To Strict Scrutiny

The Sponsors' second premise—that the Public Records Act is subject to strict scrutiny because it regulates referendum petitions, and all laws relating to the referendum process constitute core political speech—is also wrong for two reasons. First, the Act does not regulate referendum elections. It is a statute of general application that requires the disclosure of public records—including referendum petitions. Second, even if the Act is somehow viewed as an election regulation, laws governing initiative and referendum elections are not always subject to strict scrutiny.

The Court does not apply strict scrutiny to all laws that touch upon speech. Laws "that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."

Turner Broadcasting, 512 U.S. at 642 (citation omitted). The Ninth Circuit held that the Public Records Act was subject to intermediate scrutiny, and was valid under that standard. Pet. 14a-19a. The Ninth Circuit's decision is a correct application of the First Amendment. *See infra* pp. 32-36.

Nor are all laws that touch on any aspect of initiative or referendum elections always subject to strict scrutiny. The Court has referred to petition circulation, not to the entire referendum election process, as core political speech because petition circulation involves interactive communication—the exchange of ideas between the voter and the signature gatherer with respect to the proposed measure. *Meyer*, 486 U.S. at 421-22 ("the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Buckley II*, 525 U.S. at 186 ("Petition circulation, . . . is 'core political speech,' because it involves 'interactive communication concerning political change.'"). Thus, "[p]etition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in 'interactive communication concerning political change.'" *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part).

Contrary to the Sponsors' premise, however, not every aspect of the referendum process is interactive communication, and not every law that governs initiative and referendum elections is subject to strict scrutiny. According to the Court in

Buckley II, "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.* at 191. "Not all circulation-related regulations target this [interactive communication] aspect of petition circulation . . . . Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies for placement on the ballot." *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part). "These latter regulations may indirectly burden speech but are a step removed from the communicative aspect of petitioning and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review." *Id.*

The Court has adopted a flexible test to judge election regulations under the First Amendment. As the Court explained in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1191-92 (2008): "Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest. If a statute imposes only modest burdens, however, then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." (Citations and internal quotation marks omitted).

Signed petitions are released only after they have been publicly signed and submitted to the Secretary—that is when they become public records.

Disclosure under the Act is removed from the interactive communication that exists when a signature gatherer is trying to persuade a voter to sign the petition. In this respect, disclosure under the Act is like the circulator affidavit the Court approved of in *Buckley II*. There, state law required the petition circulators to "attach to each petition section an affidavit containing, *inter alia*, the circulator's name and address and a statement that he or she has read and understands the laws governing the circulation of petitions[.]" *Buckley II*, 525 U.S. at 188-89 (footnotes and internal quotation marks omitted). The affidavit was a "public record." *Id.* at 198. The Court approved of the affidavit requirement because it "does not expose the circulator to the risk of 'heat of the moment' harassment. *Cf.* 870 F. Supp. at 1004 (observing that affidavits are not instantly accessible, and are therefore less likely to be used 'for such purposes as retaliation or harassment'"). *Buckley II*, 525 U.S. at 199. The same is true with respect to the release of petitions under the Act. The State's interests in governmental transparency and accountability, and in providing voters with information, are important interests that justify this modest burden. *See infra* pp. 34-36.

Thus, if the Public Disclosure Act is viewed as an election regulation, it would not be subject to strict scrutiny because it does not implicate core political speech, and the burden it imposes on any remaining interest in associational privacy is modest indeed. It would be anomalous to subject a law of general application, such as the Act, to strict scrutiny in its application to referendum petitions,

when the Act would not be subject to strict scrutiny as an election regulation governing only such petitions.

B. This Case Does Not Meet The Criteria For Issuing A Writ Of Certiorari

The Sponsors spend slightly over one page in the petition explaining why the Court should grant the writ. But there is no basis for certiorari. There is no conflict or confusion in decisions of the court of appeals and, contrary to the Sponsors' claim, this case does not present an important national question that requires resolution by this Court.

1. The Ninth Circuit's Decision Does Not Conflict With Another Decision And There Is No Confusion Regarding The Application Of Strict Scrutiny In The Context Of Initiatives And Referendums

The Sponsors do not claim that the decision below conflicts with any other decision of the court of appeals, or the highest court of a state. Nor is there any confusion in the circuit decisions related to the Questions Presented. The Sponsors' first Question Presented asks whether the Public Disclosure Act is subject to strict scrutiny. Pet. i. The courts consistently draw the distinction between laws that restrict or regulate communicative conduct and laws that simply affect other aspects of the referendum or initiative process.

Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1085 (10th Cir. 2006), concerned a provision in the Utah Constitution requiring any

initiative relating to hunting to be passed by a two-thirds vote. The plaintiffs claimed that this requirement had a "chilling effect on their speech in support of wildlife initiatives in Utah" and argued that the requirement was subject to strict scrutiny, relying on *Meyer* and *Buckley II*. *Id.* at 1088, 1099. The Tenth Circuit refused to apply strict scrutiny, and upheld the requirement. The "distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id.* at 1099-1100. Quoting the Tenth Circuit's analysis, the Second Circuit applied the same reasoning in *Molinari v. Bloomberg*, 564 F.3d 587, 599 (2d Cir. 2009) (quoting *Initiative and Referendum Inst.*, 450 F.3d at 1099-1100). So did the Sixth Circuit in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). In *Taxpayers United*, the court recognized that "the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation. Unlike the challenged provisions in *Meyer*, Michigan's initiative system does not restrict the means that the plaintiffs can use to advocate their proposal. Further, the Michigan procedure does not limit speech on the basis of content." *Id.* at 297. The Eighth Circuit followed suit. In *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998), the court explained that "*Meyer* does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable.

Absent some showing that the initiative process substantially restricts political discussion . . . *Meyer* is inapplicable." Nor is there any confusion in the Ninth Circuit. *See Caruso v. Yamhill Cy. ex rel. Cy. Comm'r*, 422 F.3d 848, 855-56 (9th Cir. 2005) ("unlike the provisions challenged in *McIntyre* and *Meyer* (which respectively prohibited the distribution of anonymous campaign literature, and the payment of petition circulators), section 280.070(4)(a) governs the political process more than it does political speech.") (citations omitted). Finally, the Eleventh Circuit is also in accord. *Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997) ("The *Meyer* Court did not examine Colorado's initiative process as such. Rather, the Court indicated that a state, though generally free to regulate its own initiative process, is limited in the extent to which it can permissibly burden the communication of ideas about the political change at issue in an initiative proposal that occurs during petition circulation.") (citation and footnote omitted).

Thus, neither conflict between the courts nor confusion among the circuits—hallmark reasons for the grant of certiorari—is present in this case.

2. Contrary To The Sponsors' Claim, This Case Does Not Present An Important National Question

The Sponsors' only argument in support of certiorari is that this case presents an important question of whether citizens "may be constitutionally compelled to *publicly* disclose identifying information about *themselves* and their *support* for placing the measure on the ballot, or whether the

State interests are satisfied by *private* disclosure." Pet. 8.[5] Sponsors claim that this issue arises with great frequency because 27 states have some kind of initiative and or referendum procedure. *Id.* In fact, outside of this case, the Sponsors point to no other case that raises this question. Thus, the case hardly presents an important national issue warranting the attention of the Court.

Moreover, it is not unusual for initiative or referendum petitions to be released to the public. Every state in the union has some kind of public disclosure law. Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 722 (1980-1981).[6] Citizens have used these public disclosure laws to inspect initiative and referendum petitions. *State ex rel. Halloran v. McGrath*, 67 P.2d 838, 840 (Mont. 1937) (referendum "petitions or sections of petitions in the hands of the county clerk and recorder . . . are

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[5] The Sponsors also suggest that this case provides an opportunity to address the application of the preliminary injunction standard in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), in a speech-protective manner, to the First Amendment context. Pet. 7 n.9. This is not a basis for certiorari. The Sponsors do not claim that the Ninth Circuit misapplied *Winter* or that there is any confusion about how to apply the *Winter* standard. It appears from the Sponsors' discussion (Pet. 29-31) that they simply invite the Court to take up clear, well-established, preliminary injunction standards, and jettison them in favor of standards that the Sponsors would prefer.

[6] When this article was written in 1980, Mississippi was the only state that did not have a law requiring disclosure of public records. Mississippi adopted a public disclosure law in 1983. Miss. Code Ann. § 25-61-1 (West 2009).

at that time and place subject to public inspection. It is undisputed that when the petitions come to the Secretary of State with the certificates of the county clerks they are public records and subject to inspection"); *State ex rel. Kernells v. Ezell*, 282 So. 2d 266, 269 (Ala. 1973) ("In the instant case, it seems clear that the appellant is entitled to inspect this 'public writing' in the hands of the probate judge, namely, the referendum petition, and that the trial court was in error in sustaining the motion to dismiss the petition for mandamus and in discharging the alternative writ under the allegations as disclosed by the petition.").

In some states, initiative and referendum petitions are public as a matter of law without a public records request. For example, Utah "[i]nitiative packets are public once they are delivered to the county clerks." Utah Code Ann. 1953 § 20A-7-206(7) (West 2009). In Utah, a "voter who has signed an initiative petition may have his signature removed from the petition by submitting a notarized statement to that effect to the county clerk." Utah Code Ann. 1953 § 20A-7-205(3)(a)(i) (West 2009). For this reason, opponents of a measure may "contact[] the petition signers to encourage them to remove their signatures from the petition." *Gallivan v. Walker*, 54 P.3d 1069, 1077 (Utah 2002).

Prior to the adoption of the Public Records Act, the Attorney General advised that names on initiative and referendum petitions were not public records because "[w]hile there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of

the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege." 55-57 Op. Att'y Gen. 274 (Wash. 1956); Pet. 64a-65a. After the adoption of the Act in 1972, there has been a specific statute under which petitions are public records. The Secretary has released petitions concerning limiting motor vehicle charges, government regulation of private property, energy resource use, and long-term care services.

Despite the fact that initiative and referendum petitions have been released around the country for years, the question of whether the release violates the signers' First Amendment rights has never been raised until this case. This fact belies the Sponsors' claim that this case presents an important national question that must be resolved by this Court.

The Sponsors point to the fact that a website, http://knowthyneighbor.org/, has petition signer information on marriage issues in Arkansas, Florida, Massachusetts, and Oregon and allege that the purpose of the site is to encourage harassment and intimidation of the signers. Pet. 8. The Sponsors also argue that supporters of traditional marriage have been harassed and threatened because they oppose same-sex marriage or domestic partnerships between same-sex couples. Pet. 5-6. However, the claim that the petitions should not be released because of the possibility of harassment and threats is not before the Court.

In Count II of their complaint, the Sponsors claim releasing Referendum 71 petitions under the Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. Count II is based on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) and *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982). In these cases, the Court blocked the release of names of members of minority groups that hold views outside the mainstream, whose effectiveness may depend on protection from disclosure of private speech or identity. To prevail, the groups must show a "'reasonable probability' that the compelled disclosures [will subject those identified] to 'threats, harassment, or reprisals'" that will cause substantial harm to associational interests. *Brown*, 459 U.S. at 88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). Both the district court and the court of appeals expressly declined to reach Count II, and it is not before this Court. Obviously, if the Court denies the writ, the district court will have to rule on Count II.[7]

The Sponsors fail to demonstrate any reason to grant certiorari. The decision below is not in

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[7] In *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009), the district court refused to enjoin release of the names of individuals who contributed to Proposition 8, the California measure that banned same-sex marriage because plaintiffs "do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP."

conflict with another decision, there is no confusion in the circuits, and this case does not present an important national question.

C. The Ninth Circuit's Decision Is A Routine And Correct Application Of The First Amendment

The court of appeals held that the Public Records Act does not violate the First Amendment because it satisfies intermediate scrutiny. This decision is a correct application of the First Amendment, and does not require review by this Court.

The Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting*, 512 U.S. at 642. Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny[.]" *Id.* On the other hand, "regulations that are unrelated to the content of speech are subject to an *intermediate level of scrutiny* because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* (emphasis added, citations omitted).

The Public Records Act is subject to intermediate scrutiny because it is a statute of general application that is content and viewpoint neutral. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. "By contrast, laws that confer benefits or impose burdens on speech without

reference to the ideas or views expressed are in most instances content neutral." *Id.* Judged by this standard, the Act is content neutral. A public record is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency[.]" Wash. Rev. Code § 42.56.010(2). This definition does not distinguish between favored and unfavored speech. Nor does it single out particular speakers or content. State and local governments "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070. No conditions are imposed on the release of public records based on favored or unfavored speech.

A statute satisfies intermediate scrutiny if: "[1] it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662 (internal quotation marks omitted).

The Public Records Act satisfies this standard. The State has two important governmental interests.[8] The first is an interest in government transparency and accountability. In the context of referendum signature petitions, this includes the ability of Washington citizens independently to evaluate whether the Secretary properly determined whether to certify or not to certify a referendum to the ballot. Washington election law expressly contemplates that any of its citizens "dissatisfied with the determination of the secretary" will have the opportunity to challenge the determination of whether "an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters[.]" Wash. Rev. Code § 29A.72.240. Any meaningful opportunity to challenge the Secretary's determination requires access to signature petitions. Without such access, persons dissatisfied with the Secretary's determination would not be able to evaluate whether the gross number of signature petitions submitted to the Secretary satisfied the constitutional minimum, whether the Secretary counted duplicate signatures, or whether the Secretary counted the signatures of persons who are not eligible to vote under Washington law. The interest in government transparency and accountability also includes the authority of citizens to determine whether persons who sign referendum petitions in violation of state law are subject to appropriate prosecution—in other words, to evaluate whether state law enforcement

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[8] Although strict scrutiny is not the proper level of scrutiny, these governmental interests are compelling and narrowly tailored and therefore would satisfy that standard.

agencies are acting to enforce Washington election-related criminal laws. *See* Wash. Rev. Code § 29A.72.140 (requiring referendum petitions to warn of criminal penalties for knowingly (1) signing the same petition more than once, (2) signing when not a legal voter, and (3) making false statements on the petition).

The second important governmental interest is providing Washington voters the opportunity to know who has invoked the peoples' direct legislative power or, put somewhat differently, who supports the measure. When voters sign a referendum petition, they "order and direct" the Secretary to put the measure on the ballot. When voters sign a petition they are acting in their legislative capacity. *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) ("'A referendum or an initiative measure is an exercise of the reserved power of the people to legislate, and the people in their legislative capacity remain subject to the mandates of the [Washington] Constitution.'") (citations omitted).

The governmental interests in transparency and accountability, and providing information to the public, are unrelated to the suppression of free expression. In fact, these interests enhance free expression by allowing people to obtain information about their government so that they can make informed decisions.

Finally, if any incidental restrictions on First Amendment freedoms are caused by the Act (and in our view there are none), they are no greater than necessary to further the governmental interests. Public records are only released in response to a

request. Thus, any incidental impact on First Amendment freedoms exists only if a citizen requires the information and makes a request.

The Public Records Act satisfies intermediate scrutiny, and the Ninth Circuit decision upholding the Act on that basis is a correct application of the First Amendment. It does not require review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted.

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Dec. 7, 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

No. 09-559

In The
Supreme Court of the United States

John Doe #1, John Doe #2, and **Protect Marriage Washington,** *Petitioners,*

v.

Sam Reed et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply to Opposition to Petition for Writ of Certiorari

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December 16, 2009

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I. Whether the First Amendment Protects Petition Signers from Compelled Public Disclosure Is an Important Question that Deserves the Attention of This Court.

The Washington Secretary of State ("the Secretary") and Washington Families Standing Together ("WAFST") (collectively "Respondents") attempt to minimize the important First Amendment issues presented in this case by arguing that Washington's Public Records Act ("PRA") imposes only incidental burdens upon expressive association because it regulates the process of elections, not speech. (Sec'y Opp'n 21-36; WAFST Opp'n 17-19.) Accordingly, Respondents argue that the PRA is not subject to strict scrutiny. (*Id.*) Respondents are incorrect.

In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*Buckley-II*"), this Court decided that the First Amendment protects referendum petition circulators, *id.* at 197-200, because collecting signatures is "core political speech," *id.* at 186. The petition-signing conversation "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 199 (*citing Meyer v. Grant*, 486 U.S. 414, 421 (1988)).

This case involves the same conversation, from the perspective of the person on the other side of the petition clipboard. The Court is asked to accept this case to decide whether petition signers are entitled to the same protection from compelled public disclosure by the First Amendment as petition circulators. This is an important question of federal law that has not been, but should be, settled by this Court.

II. This Case Should Be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Implicitly Overrules *NAACP v. Alabama* and Proclaims that Any Private Disclosure Justifies Unlimited Public Disclosure by the Government.

The Secretary states that "[s]igned petitions are released only after they have been publicly signed and submitted to the Secretary—that is when they become public records. Disclosure under the Act is removed from the interactive communication that exists when a signature gatherer is trying to persuade a voter to sign the petition." (Sec'y Opp'n 24; *see also* WAFST Opp'n 17-18.) Similarly, the Ninth Circuit makes the assumption that, because individuals signing a petition do so in public and know that their names will be submitted to the Secretary, they forfeit any First Amendment expectations or protections they may have against the subsequent unlimited public disclosure of the petitions. (Pet. 12a-13a.)

In effect, the Ninth Circuit and Respondents assert that individuals that engage in private political speech by signing a petition and associating with a group of like-minded individuals thereby waive any right they have to prevent the unlimited public release of their personal information. The ramification of this position is that the Ninth Circuit implicitly overrules the holding of this Court in *NAACP v. Alabama*, in which this Court drew an explicit distinction between private, associational disclosure and other types of disclosure. 357 U.S. 449 (1958). If *NAACP v. Alabama* is to be overruled, it should not be done implicitly by the Ninth Circuit, but explicitly by this Court. Thus, this case

presents an issue worthy of decision by this Court.

In *NAACP v. Alabama*, this Court prevented certain membership lists of the NAACP from being disclosed to the government. *Id.* at 467. The individual members of the NAACP who chose to exercise their First Amendment rights and associate with the NAACP were not subject to government disclosure merely because of association with the group. *Id.*; *see also Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (preventing compelled disclosure of membership lists to government).

In contrast to *NAACP v. Alabama*, the Ninth Circuit's and Respondents' arguments presume that, because individuals associated with a group and disclosed themselves to that group, any further First Amendment rights regarding disclosure of their personal information—such as the disclosure to the government that was sought and denied by this Court in *NAACP v. Alabama*—is waived. Put simply, individuals that engage in a private disclosure should assume that disclosure is not private, but is public.

Taken to its conclusion, the Ninth Circuit's and Respondents' argument would allow an extraordinary level of intrusion into protected First Amendment rights. This argument would suggest that if a group such as the Federalist Society or the ACLU posted some of its prominent members on the internet to encourage support and establish it as a legitimate organization, the public should be allowed access to all members of the organization because there has been some public disclosure of the membership. Taken further, this argument would allow unlimited public disclosure of anything a person says or does, so long as the action was seen or heard by a member of the public—even if that private disclosure was not made in

public, and was only seen or heard by one other individual.

This position is even more troublesome when one considers that twenty-seven states have some sort of ballot measure provision. Even if the decision of the Ninth Circuit is limited to the Ninth Circuit, it impacts eight of the nine states located within the Circuit, each of which have ballot measure provisions.

III. This Case Should be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Deviates from this Court's History of Analyzing Each Component of Disclosure Separately and Distinctly.

Respondents and the Ninth Circuit take the position that, once one aspect of disclosure has satisfied the First Amendment, no further analysis of the First Amendment on subsequent disclosure need be made. (Sec'y Opp'n 17-21; WAFST Opp'n 16-18; Pet. 16a-19a.) In other words, Respondents "piggy back" the unlimited release of the petition signers on their First Amendment analysis of the limited government disclosure and private disclosure, which should be separately analyzed.

The ramification of this position is that the Ninth Circuit and Respondents deviate from the long history of this Court analyzing each component of disclosure separately and distinctly to determine whether individuals' First Amendment rights are being adequately protected. The Ninth Circuit decided this case without separately analyzing each aspect of disclosure; if this is the position that should now be taken in the Ninth Circuit and those states where there are ballot mea-

sures, this is something that this Court, rather than the Ninth Circuit, should determine. Thus, this case presents an issue worthy of decision by this Court.

To understand the ramifications of the position taken by the Ninth Circuit and Respondents, one must look at the three distinct levels of disclosure implicated in the present case. (Pet. 11-16.)

The first disclosure occurs when an individual opts to sign a petition. The disclosure includes a decision to associate with the individual or group sponsoring the petition. It also includes limited disclosure to a small number of individuals who either opt to sign the same petition sheet or who review the sheet and decide not to associate. (Pet. 11-12.)

The second type of disclosure occurs when the group sponsoring the referendum submits the petitions to the state.[1] This limited disclosure is necessary to determine whether the petition received a sufficient number of signatures to receive a place on the ballot. (Pet. 12-13.)

The third type of disclosure that the Ninth Circuit and Respondents allege must occur is unlimited public disclosure of the petition signers. (Pet. 13.)

The concept that each of these aspects of disclosure must be separately analyzed for its impact on protected First Amendment rights is not a new or unique concept; this Court often analyzes the distinct effects of the First Amendment upon separate aspects of a law. *See, e.g., FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) ("*WRTL-II*") (rejecting "prophylaxis-upon-

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[1] Presumably, had the petitions not contained the requisite number of signatures to place R-71 on the November 2009 ballot, the only type of disclosure that would have occurred would have been the first—private disclosure.

prophylaxis approach"); *Buckley-II*, 535 U.S. at 182 (analyzing each aspect of a law dealing with petition signers and the application of the Constitution to those aspects of the law separately).

Here, neither Respondents nor the Ninth Circuit perform this separate and distinct analysis of the First Amendment on the third type of disclosure—unlimited public disclosure. Instead, their arguments presume that, because limited disclosure may have been appropriate with the first two types of disclosure—private disclosure and limited government disclosure—that an individual waives his or her First Amendment rights with regard to the third type of disclosure—unlimited public disclosure.

Under the Ninth Circuit's and Respondents' position, this Court would have only needed to analyze one aspect of the restrictions on the petition circulators in *Buckley-II* to find that all of the restrictions are constitutionally sound, or that all of the restrictions are constitutionally unsound. However, this analysis was expressly refuted in *Buckley-II*, which looked at the various regulation imposed by Colorado's restrictions on circulators separately, to determine the constitutionality of each of those separately. *Buckley-II* at 192; *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 (1995) (protecting the right to anonymously distribute political handbills even though author had identified herself on some distributed handbills); *WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"). The Ninth Circuit and Respondents espouse a position that deviates from this Court's history of analyzing each instance of disclosure separately, to determine whether proper First Amendment protections are being given to individuals at each instance where disclosure occurs.

IV. The Procedural Posture Provides the Court with an Opportunity to Apply the Preliminary Injunction Standards in a Speech-Protective Manner.

As set forth above and in the Petition, this case presents the Court with an opportunity to answer important questions of federal law that have not been, but should be, decided by this Court. WAFST argues that the procedural posture makes the case a poor vehicle to resolve the legal issues. (WAFST Opp'n 10-14.) WAFST is incorrect.

The procedural posture illustrates the wisdom of deciding the important questions presented at the earliest possible juncture because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The case also provides the Court with an opportunity to apply the standards for a preliminary injunction, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008), in a manner that is speech- and association-protective. (*See also* Pet. 29-34.)

At stake are the speech and associational rights of more than 138,000 citizens that signed the R-71 petition, as well as countless other signatories to referendum and initiative petitions in Washington and throughout the nation. The potential chilling effect on the freedoms of speech and association resulting from the Ninth Circuit's opinion and analysis are substantial and deserve the attention of this Court. *See Perry v. City & County of San Francisco*, No. 09-17241 (9th Cir. Dec. 11, 2009) (justifying exercise of mandamus jurisdiction in part because of potential chilling effect on First Amendment rights of otherwise un-appealable

discovery order). Once names are released, there is no way to un-ring the bell, even if this Court were to later rule for Petitioners.

Moreover, the issues here are primarily legal and do not require a developed factual record.[2] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justifications raised."). In close cases, the tie must always be drawn in favor of the speaker, *WRTL-II*, 551 U.S. at 474, especially at the preliminary injunction stage where the issue is the preservation of the status quo, i.e., no-law or non-disclosure, as the parties litigate the important First Amendment issues. The procedural posture of the case should not dissuade this Court from answering the important questions of federal law presented given the potential chilling effect on political speech connected to one of the purest forms of democracy: self-governance through the initiative and referenda process.

Illustrating the importance of the questions presented are similar cases proceeding in West Virginia involving referenda. One concerns a city ordinance requiring two police officers in every cruiser. *See* Casey Junkins, *Voters to Decide Cruiser Issue*, The Intelligencer: Wheeling News-Register, Aug. 19, 2009.[3] The Fraternal Order of Police opposed the referendum and

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[2] Petitioner's second count—relating to the threats, harassment, and reprisals suffered by supporters of traditional marriage—is more fact-intensive. It is not before the Court.

[3] *Available at* http://theintelligencer.net/page/content.detail/id/527357.html.

was granted access to petition signers' names. *See* Casey Junkins, *Recht: Give FOP the Signatures*, The Intelligencer: Wheeling News-Register, Nov. 5, 2009.[4] The chilling effect of an organization such as the Fraternal Order of Police having access to a petition adverse to its interest is self-evident.

The other case involved a referendum directed at a land-use planning ordinance. A newspaper sued after its Freedom of Information Act request for copies of the petitions was denied. *See* Thomas Harding, *Judge Sanders Keeps Petition Names Secret*, The Observer, Sept. 5, 2009.[5] The judge, recognizing the important First Amendment issues, dismissed the case, stating that "making the names of those individuals who signed the petitions [public] would have a chilling effect on the ability of citizens to petition the government." *The Shepherdstown Observer, Inc. v. Maghan*, No. 09-c-169, Order of Dismissal at 6 (Jefferson County, W.Va. 2009) (*available at* http://jeffersoncountyclerkwv.com/).[6]

Further, technology has exponentially increased the chilling effect that compelled public disclosure has upon protected First Amendment activity, and thus, the effect of the Ninth Circuit's opinion. (Pet. at 18-23.) This is illustrated by the Secretary's own comments explaining the history of petition disclosure in Washington. "[F]rom 1998 to 2006 nobody followed through on a public records request for such documents because

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[4] *Available at* http://www.theintelligencer.net/page/content.detail/id/530542.html.

[5] *Available at* http://www.wvobserver.com/2009/08/judge-sanders-keeps-petition-names-secret/.

[6] Available at http://jeffersoncountyclerkwv.com/.

it was far too expensive."[7] Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/). Thus, despite a policy change in 1998, the chilling effect of public disclosure remained hypothetical because no one requested copies. Today, the chill is real. *See* http://www.knowthyneighbor.org (posting the names and addresses of petition signers in Arkansas, Florida, Massachusetts, and Oregon, and threatening to do the same in Washington). The Secretary is prepared to disclose copies of the R-71 petition if the Ninth Circuit's opinion is allowed to stand. Release will result in immediate and irreparable injury to the speech and associational rights of more than 138,000 Washington citizens as well as untold others in future referenda across the country. This makes the questions presented important questions of law deserving this Court's attention.

V. Conclusion

As set forth above and in the Petition, Respondents and the Ninth Circuit have taken a simple position: the

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[7] The PRA was adopted in November 1972 and became effective January 1, 1973. Until 1998, the Secretary took the position that referendum petition sheets were not subject to public disclosure under the PRA, a policy consistent with that of the Secretary prior to the adoption of the PRA. Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/); *see also* Pet. 3-4.

individual circulating a referendum petition in Washington is granted more First Amendment protections than the individual who is signing the petition. Such a position is contrary to law and logic. For the reasons stated here and in the Petition, this Court should grant this petition.

Respectfully submitted,

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JOINT APPENDIX

CORRECTED COPY

Supreme Court U.S.
FILED
FEB 25 2010
OFFICE OF THE ...

No. 09-559

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners*

v.

Sam Reed et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Joint Appendix

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Petition for Certiorari Filed November 5, 2009
Petition for Certiorari Granted January 15, 2010

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RELEVANT DOCKET ENTRIES UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON - TACOMA DIVISION

Case # 3:09-cv-05456-BHS

Date	Docket	Description
7/28/09	2	COMPLAINT against defendant(s) Sam Reed and Debra Galarza (Receipt # SEA 27931), filed by John Doe #1, John Doe #2, and Protect Marriage Washington. (Attachments: # 1 Civil Cover Sheet, # 2 Civil Cover Sheet attachment, # 3 Exhibit 1 to Complaint, # 4 Exhibit 2 to Complaint, # 5 Exhibit 3 to Complaint, # 6 Exhibit 4 to Complaint, # 7 Signature page to Complaint) (TG) (Entered: 07/29/2009)
7/28/09	3	MOTION Plaintiffs Notice of Motion and Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction by Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington. (Attachments: # 1 Proposed Order on Motion for Pre-

		liminary Injunction, # 2 Proposed Order on Motion for Temporary Restraining Order); Noting Date 7/29/2009. (TG) (Entered: 07/29/2009)
8/14/09	26	DECLARATION of Nick Handy filed by Defendants Sam Reed, Brenda Galarza re 3 MOTION for Temporary Restraining Order (Pharris, James) (Entered: 08/14/2009)
8/14/09	27	DECLARATION of Blinn filed by Defendants Sam Reed, Brenda Galarza re 3 MOTION for Temporary Restraining Order (Pharris, James) (Entered: 08/14/2009)
9/3/09	59	ORDER AMENDING AND EXTENDING THE COURT'S TRO: The TRO will dissolve upon the earliest of September 11, 2009 signed by Judge Benjamin H. Settle.(JAB) (Entered: 09/03/2009)
9/3/09	62	MINUTE ENTRY for proceedings held before Judge Benjamin H Settle- Dep Clerk: Jean Boring; Pla Counsel: Sarah E Troupis/Stephen Pidgeon; Def Counsel: James Pharris (AG) / Kevin Hamilton (Intv-WA Families) / Steven Dixson (Intv WA

Coalition); CR: Julaine Ryen; Preliminary Injunction Hearing held on 9/3/2009. MOTION 43 to Intervene by Washington Families Standing Together is GRANTED, MOTION 36 to Intervene by Washington Coalition for Open Government is GRANTED; Arthur West's Motion to Intervene was preliminarily DENIED because no motion was posted to the docket as of the time of this hearing. Clerk shall post the motion and the Court will rule after reviewing. Motion 24 to Consolidate Preliminary Injunction Hearing on Count I of Complaint with Trial on the Merits is DENIED. No trial will be set. Court & Counsel review proposed order extending the TRO. Court inquires of counsel the need for a bond should the preliminary injunction be issued. Court amends and extends the temporary restraining order to consider the oral arguments of counsel and will issue a written decision on plaintiffs motion for a preliminary injunction on or before 9/11/2009. Hearing concluded. (Entered: 09/08/2009)

[Dkt. 2, filed July 28, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,	)	
Plaintiffs,	)	
v.	)	No. 3:09-cv-05456-BHS
SAM REED, in his official capacity as Secretary of State of Washington, DEBRA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,	)	VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
Defendants.	)	

John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington complain and allege as follows:

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States.

This case concerns the constitutionality of the Washington Public Records Act, Wash. Rev. Code § 42.56.001, *et seq.*, as it applies to the public release of referenda petitions submitted to the Secretary of State of Washington.

2. The rights of citizens to peaceably assemble and petition the government for redress of grievances are among the fundamental rights protected by the Bill of Rights. Inherent within these rights is the right of individuals to engage in anonymous speech, speech that has "played an important role in the progress of mankind." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341 (1995); *id.* at 343 n. 6 (citing the Federalist Papers as perhaps the most famous example of anonymous writing in our nation's political history). And as the Supreme Court has recognized, there is nothing inherently suspect with an individual wanting to keep his or her support for an issue private. *Id.* at 341-42 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.")

3. The public release of a referendum petition containing the names and addresses of over 138,500 Washington residents pursuant to Washington's Public Records Act threatens to undermine the First Amendment's goal of encouraging "uninhibited, robust, and wide-open" debate, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). By publicly disseminating the names of individuals signing a referendum petition, individuals and organizations hope to make it personally, economically, and politically unpopular to

advocate a position that would seek to preserve the sanctity of marriage, as traditionally defined as between one man and one woman.

4. Given the sensitive First Amendment rights at issue, Plaintiffs complain that the State of Washington lacks a compelling interest sufficient to justify the public disclosure of referendum petitions.

5. In the alternative, Plaintiffs complain that, if the State possesses a compelling state interest, the Public Records Act is unconstitutional because there is a reasonable probability of threats, harassment, and reprisals if the names and addresses of the petition signers are publicly released.

6. Given the nature of the rights asserted, the failure to obtain injunctive relief from this Court will result in immediate and irreparable injury to Plaintiffs.

JURISDICTION AND VENUE

7. This case raises questions under the Constitution of the United States and 42 U.S.C. § 1983, and thus this Court has jurisdiction over all claims for relief pursuant to 28 U.S.C. §§ 1331 and 1343(a).

8. The Western District of Washington is the proper venue for this case pursuant to 28 U.S.C. § 1391(b) because Defendants Reed and Galarza reside in this district, Plaintiff Protect Marriage Washington has its principle place of business in this district, and Plaintiffs John Doe #1 and John Doe #2 reside in Washington.

PARTIES

9. Plaintiff John Doe #1 is an individual and resident of Stevens County, Washington. Plaintiff John Doe #1 signed the Referendum 71 petition.

10. Plaintiff John Doe #2 is an individual and resident of Cowlitz County, Washington. Plaintiff John Doe #2 signed the Referendum 71 petition.

11. Plaintiff Protect Marriage Washington is a State Political Committee organized pursuant to Wash. Rev. Code § 42.17.040, to place Referendum 71 on the ballot and to encourage citizens to reject SB 5688, and has its principal place of business in Snohomish County, Washington.

12. Defendant Sam Reed is the Secretary of State of Washington. In his official capacity, Defendant Reed is responsible for receiving referendum petitions pursuant to Wash. Rev. Code § 29A.72.010 and for making public records available pursuant to the Public Records Act. Wash. Rev. Code § 42.56.001 *et seq.*

13. Defendant Brenda Galarza is the Public Records Officer for Defendant Reed. Upon information and belief, Defendant Galarza has been appointed by Defendant Reed, pursuant to Wash. Rev. Code § 42.56.580, to serve as the point of contact for members of the public when requesting disclosure of pubic records from the Secretary of State and to oversee the agency's compliance with the Public Records Act.

FACTS

14. Pursuant to Wash. Const. art. II, § 1(b), the referendum power is reserved by the people of Washington State.

15. The referendum power grants Washington citizens the right to call a referendum on any act, bill, law, or any part thereof passed by the legislature by submitting a petition to that effect to the Secretary of State. Wash. Const. art. II, § 1(b).

16. If a petition submitted to the Secretary of State contains at least four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the referendum petition, the effective date of the act, bill, law, or any part thereof is delayed until the electorate has an opportunity to vote on the referendum. Wash. Const. art. II, §§ 1(b) & (d).

17. An act, bill, law, or any part thereof, subject to a referendum, becomes law only if a majority of the votes cast are in favor of the referendum. Wash. Const. art. II, § 1(d).

18. On January 28, 2009, Washington State Senator Ed Murray introduced Senate Bill 5688 ("SB 5688"), a bill designed to expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses. The legislation is commonly referred to simply as the "everything but marriage" domestic partnership bill.

19. On March 10, 2009, after various amendments, the Washington Senate passed Second Substitute Senate Bill 5688.

20. On April 15, 2009, the Washington House of Representatives passed Second Substitute Senate Bill 5688.

21. On or about May 4, 2009, Larry Stickney filed notice with the Secretary of State of his intent to circulate a referendum petition related to SB 5688. The Secretary of State assigned the title "Referendum 71."

22. On or about May 13, 2009, Protect Marriage Washington organized as a State Political Committee pursuant to Wash. Rev. Code § 42.17.040.

23. Protect Marriage Washington's purpose is to circulate a referendum petition on SB 5688 and to encourage voters to reject SB 5688.

24. Larry Stickney is the campaign manager of Protect Marriage Washington.

25. As the campaign manager for Protect Marriage Washington, Larry Stickney has received a large number of emails from people who disagree with his position on marriage. True and correct copies of some of these emails are attached to this Complaint as Exhibit 1. Some of these emails are threatening and/or harassing. For example, one threatening email states: "You better stay off the olympic peninsula. . it's a very dangerous place filled with people who hate racists, gay bashers and anyone who doesn't believe in equality. Fair is fair." Another email threatened the signers of the Referendum 71 petition with boycotts: "We shall boycott the businesses of EVERYONE who signs your odious, bigoted petition." Other emails are offensive and harassing: "Dear God fearing hate mongerers — . . . Maybe you just want to feel a cock in your ass and hate yourself for it. Whatever. Praise Jeebus you retarded fuckholes!"

26. These threats have caused Larry Stickney a great deal of worry for his safety and the safety of his family.

27. Early in the campaign to circulate the Referendum 71 petition, Larry Stickney made his children sleep in an interior living room because he feared for their safety if they slept in their own bedrooms.

28. In late June an individual was seen taking pictures of Larry Stickney's home while his daughter played outside.

29. Larry Stickney filed a complaint with his local sheriff because of threats on a local blog. One of the blog posts stated: "If Larry Stickney can do 'legal' things that harm OUR family, why can't we go to Arlington, WA to harm his family?" A true and correct copy of Larry Stickney's email correspondence with the Sheriff is is attached to the Complaint as Exhibit 2.

30. Larry Stickney has also received threatening and harassing phone calls from individuals in the middle of the night. For example, shortly after Referendum 71 was presented to the Secretary of State on May 4, 2009, he received a phone call at 2:00 a.m. from a woman who sounded frantic and deranged, and who said various obscene and vile things to him.

31. Since Referendum 71 was submitted to the Secretary of State for review on May 4, 2009, numerous news sources and blogs have focused their attention on intimate details of Larry Stickney's personal life. For example, "The Stranger," an alternative Seattle newspaper, published details of his divorce that occurred fifteen years ago. A true and correct copy of that article is attached to this Complaint as Exhibit 3.

32. On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688.[1]

33. Upon information and belief, the group WhoSigned.org threatened to publish the names of every individual signing the Referendum 71 petition on or about June 1, 2009.

34. Upon information and belief, Plaintiffs believe that WhoSigned.org intends to make an end-run

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[1] The enacted legislation subject to the referendum petition will be referred to simply as SB 5688.

around Wash. Rev. Code § 29A.72.230 (prohibiting proponents and opponents of a referendum petition from making records of the names, addresses, and other information on the petition during the verification and canvass process), by requesting copies of the petitions submitted pursuant to Washington's Public Records Act, Wash. Rev. Code § 42.56.001 *et seq*.

35. On or about June 2, 2009, Dave Ammons, communications director for Defendant Reed, posted a blog entry on the Secretary of State's website suggesting that the Secretary of State intended to comply with WhoSigned.org's Public Records request. A true and correct copy of that blog post is attached hereto as Exhibit 4.

36. On or about June 9, 2009, the group KnowThyNeighbor.org issued a joint press release with WhoSigned.org again threatening to publish the names on the internet of every individual signing the Referendum 71 petition.

37. KnowThyNeighbor.org and WhoSigned.org have publicly stated that they intend to publish the names of petition signers on the internet and to make the names searchable.

38. KnowThyNeighbor.org and WhoSigned.org have stated that the purpose of placing the names on the internet is to encourage individuals to contact any person who signed the Referendum 71 petition.

39. The news media has widely reported that KnowThyNeighbor.org and WhoSigned.org intend to publish the names of any individual who signs the petition on the internet.

40. On Saturday, July 25, 2009, Protect Marriage Washington submitted the petition with over 138,500

signatures to Defendant Reed, exceeding the number of signatures necessary to place a referendum question on the ballot.

41. By filing the petition, Plaintiffs have delayed the effective date of SB 5688. If the Secretary of State determines that petition contains a sufficient number of valid signatures, SB 5688 will become law only if a majority of Washington residents vote to "approve" the bill at the next general election.

42. Defendant Reed is responsible for verifying and canvassing the signatures on the Referendum 71 petition. Proponents and opponents of Referendum 71 are permitted to have representatives present during the verification and canvass process. The statute prohibits proponents and opponents who are observing the verification and canvass process from making any records of the names, addresses, or other information contained on the petitions. Wash. Rev. Code §29A.72.230.

43. Plaintiff Protect Marriage Washington, and its officers and directors have been subject to threats, harassment, and reprisals while attempting to gather the signatures necessary to place Referendum 71 on the ballot.

44. Petition circulators have been subjected to threats, harassment, and reprisals as they attempted to obtain the signatures necessary to place Referendum 71 on the ballot.

45. Defendant Galarza has stated that referendum petitions are "public records" within the meaning of Wash. Rev. Code § 42.56.10(2) and are subject to public disclosure pursuant to Wash. Rev. Code § 42.56.070.

46. Given the threats, harassment, and reprisals directed at Plaintiff Protect Marriage Washington, petition signers, and supporters of a traditional definition of marriage across the country, there is a reasonable probability that the disclosure of those who signed the Referendum 71 petition, including disclosure of the addresses of petition signers, will result in threats, harassment, and reprisals.

47. The threatened publication of the petitions has created an environment that discourages Washington citizens from exercising their First Amendment rights to participate in the referendum process.

48. The threatened publication of the petitions discourages individuals and organizations from exercising their First Amendment rights to support the effort to encourage Washington citizens to reject SB 5688.

49. Plaintiffs have suffered, or will suffer, irreparable harm if the requested relief is not granted.

LEGAL ARGUMENTS COMMON TO PLAINTIFFS' CLAIMS

50. "The First Amendment is the pillar of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Mont. Right to Life v. Eddlemann*, 999 F. Supp. 1380, 1384 (D. Mont. 1998).

51. "In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

52. In *Buckley*, the Supreme Court held that any significant encroachment on First Amendment rights, such as those imposed by compelled disclosure provisions, must survive exacting scrutiny, which requires the government to craft a narrowly tailored law to serve a compelling government interest. *Buckley*, 424 U.S. at 64.

53. The Supreme Court has recognized that the principles applied in *Buckley* apply as forcefully to activities surrounding the referenda process. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas. We therefore detail why we are satisfied that . . . the restrictions in question significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.") (internal citations omitted); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) (applying *Buckley*'s contribution limit analysis in the context of ballot measure elections).

54. The Public Records Act, in so far as it results in the public disclosure of the names and addresses of petition signers, results in compelled political speech.

55. The Supreme Court has repeatedly reaffirmed that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008) (*quoting Buckley*, 424 U.S. at 64.

56. To survive exacting scrutiny, the Public Records Act must be narrowly tailored to serve a compelling government interest. *Buckley*, 424 U.S. at 64.

57. The burden is on the State to demonstrate that the Public Records Act is narrowly tailored to serve a compelling state interest. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)).

58. In the context of the First Amendment, the usual deference granted to the legislature does "not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law." *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 666 (1994) (internal citations omitted). The Court's role is to ensure that the legislature "has drawn *reasonable inferences* based on *substantial* evidence." *Id.* (emphasis added).

59. The Ninth Circuit recently held that compelled disclosure of *de minimis* support of a referenda is unconstitutional under the First Amendment. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009).

60. Furthermore, even if the Public Records Act is narrowly tailored to serve a compelling government interest, it remains unconstitutional because there is a reasonable probability that the disclosure of the names of those individuals who signed the Referendum 71 petition will expose those individuals to threats, harassment, and reprisals. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (applying the reasonable-probability test announced in *Buckley*, 424 U.S. at 73).

COUNT I – THE PUBLIC RECORDS ACT IS UNCONSTITUTIONAL AS APPLIED TO REFERENDUM PETITIONS

61. Plaintiffs incorporate here by reference paragraphs one through sixty, *supra*, as if fully set forth herein.

62. The Public Records Act violates the First Amendment as applied to referendum petitions because the Public Records Act is not narrowly tailored to serve a compelling government interest.

63. WHEREFORE, Plaintiffs request the following relief:

a. Declare Wash. Rev. Code § 42.56.070 unconstitutional to the extent that it requires the Secretary of State to make referendum petitions submitted to the Secretary of State's office available to the public;

b. Enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;

c. Grant Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

d. Any and all other such relief as may be just and equitable.

COUNT II – THE PUBLIC RECORDS ACT IS UNCONSTITUTIONAL AS APPLIED TO THE REFERENDUM 71 PETITION BECAUSE THERE IS A REASONABLE PROBABILITY OF THREATS, HARASSMENT, AND REPRISALS

64. Plaintiffs incorporate here by reference paragraphs one through sixty, *supra*, as if fully set forth herein.

65. In the alternative, the Public Records Act is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals.

66. WHEREFORE, Plaintiffs request the following relief:

a. Declare Wash. Rev. Code § 42.56.070 unconstitutional to the extent that it requires the Secretary of State to make the Referendum 71 petition, or any petition related to the definition or marriage or the rights and responsibilities that should be accorded to same-sex couples, submitted to the Secretary of State's office available to the public;

b. Enjoin Defendants from making the Referendum 71 petition, or any petition related to the definition or marriage or the rights and responsibilities that should be accorded to same-sex couples, available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;

c. Grant Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington their cots and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

d. Any and all other such relief as may be just and equitable.

VERIFICATION

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS CONCERNING ME IN THIS COMPLAINT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated this 28th day of July, 2009.

s/ Larry Stickney

Larry Stickney

Dated this 28th day of July, 2009.

Respectfully submitted,

s/ Stephen Pidgeon
Stephen Pidgeon
ATTORNEY AT LAW, P.S.
10900 NE 8th Street,
Suite 900
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98004
(425) 605-4774
Counsel for All Plaintiffs

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47807-3510
(812) 232-2434
Counsel for All Plaintiffs

**Pro Hac Vice Application Pending*

[Dkt. 3, filed July 28, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, v. SAM REED, in his official capacity as Secretary of State of Washington, DEBRA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	No. 3:09-cv-05456-BHS Plaintiffs' Notice of Motion and Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum in Support or Motion for Temporary Restraining Order and Preliminary Injunction

[Tables of Contents and Authorities Omitted]

TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

YOU ARE HEREBY GIVEN NOTICE THAT on A DATE TO BE DETERMINED BY COURT ORDER, before a JUDGE TO BE DETERMINED in Courtroom TO BE DETERMINED BY COURT ORDER of the

United States District Court for the Western District of Washington, Seattle Division, located at 700 Stewart Street, Seattle, Washington 98101, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington, will and hereby do move for a temporary restraining order and preliminary injunction against Defendants.

[Pages 2-7 and portions of Page 8 Omitted]

This motion for temporary restraining order and preliminary injunction is made pursuant to Fed. R. Civ. P. 65, and on the grounds specified in this Notice of Motion and Motion, and Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, the documents filed in support thereof, the Verified Complaint, and such other and further evidence as may be presented to the Court at the time of the hearing.

Pursuant to this notice, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington do hereby move for a preliminary injunction to:

(1) Enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise;

(2) Enjoin Defendants from making the Referendum 71 petition or any petition related to the definition of marriage or the rights and responsibilities that should

be accorded to same-sex couples, available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise.

[Pages 9-39 Omitted]

[Dkt. 26, filed August 14, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,	)	
Plaintiffs,	)	
v.	)	No. 09-5456BHS
SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,	)	DECLARATION OF NICK HANDY IN OPPOSITION TO PRELIMINARY INJUNCTION
Defendants.	)	

I, Nick Handy, declare as follows:

1. I am over eighteen years of age and competent to testify. I serve as director of Elections in the Office of the Secretary of State for the state of Washington. I was appointed to this position in May 2004 by Secretary of State Sam Reed, and have served in this position for over five years.

2. I supervise all of the operations of the Elections Division of the Secretary of State's Office, and oversee administration of state and federal elections, including the state primary and general elections. I am familiar with the following information in that capacity.

3. The Secretary of State is charged by statute with administering the filing of initiative and referendum measures and for certifying such measures to the ballot. The Elections Division carries out the Secretary's responsibilities regarding initiatives and referenda. To qualify a measure for the ballot, initiative and referendum measure proponents must collect and submit a minimum number of valid signatures of registered voters in the state. The Elections Division verifies the validity of the signatures submitted on the petition forms and certifies measures to the general election ballot that meet these signature requirements.

4. Referendum Measure 71 was filed with the Office of the Secretary of State as a proposed ballot measure on May 4, 2009. Referendum Measure 71 asks voters to either accept or reject Engrossed Second Substitute Senate Bill 5688, passed by the 2009 Legislature, relating to the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners.

5. Referendum petition sheets must include a place for each signer to sign and print his or her name, and the address, city, and county at which he or she is registered to vote (Wash. Rev. Code § 29A.72.130).

6. On the afternoon of Saturday, July 25, 2009, the proponents of Referendum 71 submitted 9,359 petition sheets with signatures to the Secretary of State. The petition sheets were delivered in an open, public forum. Referendum supporters and opponents were in atten-

dance, as were several members of the news media. The petition sheets were counted by Elections Division staff under observation by representatives from organizations supporting and opposing the referendum.

7. After counting the petition sheets, the state Elections Division issued a letter to the sponsor stating the official count of petitions sheets accepted by the office. The petition sheets were transferred to the Washington State Archives to be secured in a vault for the remainder of the weekend. The state Archives are a division of the Office of the Secretary of State.

8. On Monday, July 27, 2009, the petition sheets were transferred from the vault to the Imaging Services division of the state Archives. Imaging services made a digital (electronic) copy of each petition sheet. After imaging, the original petition sheets were returned to the Elections division. Since July 27, my office has been counting and verifying the individual signatures on the petitions to determine whether a sufficient number of signatures have been filed to qualify Referendum Measure 71 for the November 2009 election ballot.

9. On Tuesday, July 28, 2009, Mr. Brain Murphy submitted a public records request to Brenda Galarza, the agency's Public Records Officer. Mr. Murphy requested digital images of all petition sheets. He asked that these images be provided on DVDs. On Friday, July 31, Mr. Toby Nixon submitted a public records request to Ms. Galarza for the same records, asking for scanned images on a CD-ROM. On August 4 Mr. Arthur West submitted a public records request to Ms. Galarza for the same records. On August 6, Mr. Brian Spencer submitted a public records request to Ms. Galarza for the same records.

10. The Secretary of State's office considers initiative and referendum petition sheets filed with our office to be public records under the state public records laws. State law generally makes all public records available for public inspection and copying, and contains no exemption covering petitions or petition signatures. Our office routinely fulfills these requests and provides the requested records, at cost, to the requester. In recent years, we have received public records requests for petitions supporting the following initiative measures, and we produced copies of the petitions bearing the names and addresses of signers in response to each one:

a. Initiative 917 (concerning limiting motor vehicle charges) (2 requests) (2006);

b. Initiative 933 (concerning government regulation of private property) (2006);

c. Initiative 937 (concerning energy resource use by certain electric utilities) (2006);

d. Initiative 1029 (concerning long-term care services for the elderly and persons with disabilities) (2008); and

e. Initiative 1033 (concerning state, county and city revenue) (2009). Our office is currently processing this request.

11. Four referendum measures have qualified to the ballot in Washington through the petition process in the past 20 years. Those measures were

a. Referendum Measure 48 (concerning land use regulation) (1995);

b. Referendum Measure 53 (concerning unemployment insurance) (2002);

c. Referendum Measure 55 (concerning charter public schools) (2004); and

d. Referendum Measure 67 (concerning insurance coverage and benefits) (2007).

We did not receive public records requests for the petitions supporting any of these measures.

12. Absent court order, our office intends to honor any public records requests for petition sheets for Referendum 71.

13. I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge, and that I executed this declaration at Olympia, Washington, in the county of Thurston, this 12th day of August, 2009.

s/ Nick Handy
Nick Handy

[Dkt. 27, filed August 14, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,	)	
Plaintiffs,	)	
v.	)	No. 09-5456BHS
SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,	)	DECLARATION OF CATHERINE S. BLINN IN OPPOSITION TO PRELIMINARY INJUNCTION
Defendants.	)	

I, Catherine S. Blinn, declare as follows:

1. I am over eighteen years of age and competent to testify. I serve as an Assistant Direct of Elections in the Office of the Secretary of State for the state of Washington. I was appointed to this position in 2005 by Secretary of State Sam Reed, and have served in this position since that time.

2. In my capacity as an Assistant Director of Elections I have personal knowledge of the following information.

3. Attached to this Declaration as Exhibit A is a true scanned copy of a signature petition for Referendum Measure 71, exclusive of the names, addresses and signatures of the persons who signed the petition, which material has been redacted. The printed material on all of the signature petitions for Referendum 71 is identical.

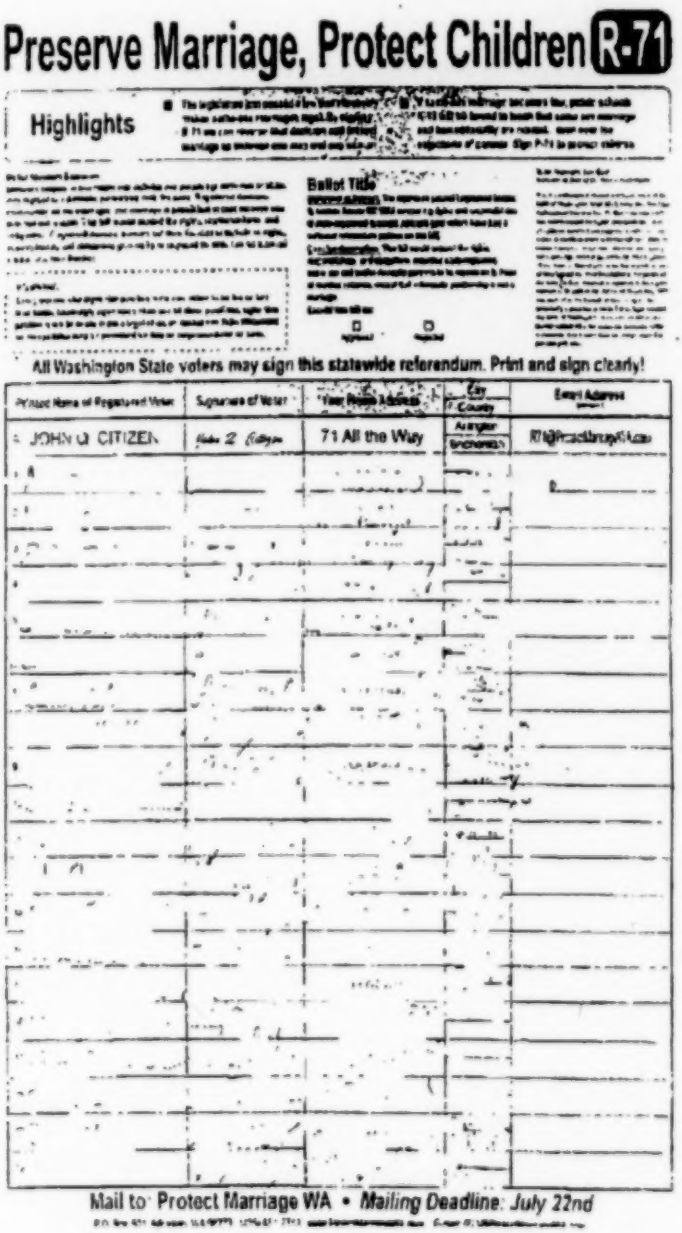
4. Pursuant to article II, section 1(d) of the Washington Constitution and Wash. Rev. Code § 29A.72.130, the attached petition for Referendum Measure 71 is directed: "To the Honorable Sam Reed, Secretary of State of the State of Washington". As provided in Wash. Rev. Code § 29A.72.130, its signers "order and direct that Referendum Measure No. 71 . . . shall be referred to the people of the state for their approval or rejection at the regular . . . election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." As provided in Wash. Rev. Code § 29A.72.140, the signature petition contains a warning that: "Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by a fine or imprisonment or both."

5. I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true

and correct and of my own knowledge, and that I executed this declaration at Olympia, Washington, in the county of Thurston, this 14th day of August, 2009.

s/ Catherine S. Blinn
Catherine S. Blinn

Exhibit A - Page 1 [A copy of Exhibit A - Page 1, filed as an oversized exhibit, is included in the pocket part to the Joint Appendix.]



Preserve Marriage, Protect Children R-71

Highlights

Ballot Title

All Washington State voters may sign this statewide referendum. Print and sign clearly!

Printed Name of Registered Voter	Signature of Voter	Your Home Address	City / County	Email Address
1. JOHN Q. CITIZEN	John Q. Citizen	71 All the Way	Anytown Snohomish	RU@protectmarriage.com

Mail to: Protect Marriage WA • *Mailing Deadline: July 22nd*

BEST AVAILABLE COPY

[Exhibit A - Pages 5-11 have been omitted]

Exhibit A - Page 12 [A copy of Exhibit A - Page 12, filed as an oversized exhibit, is included in the pocket part to the Joint Appendix.]

Preserve Marriage, Protect Children R-71

Before you mail in your petition, make sure to print and sign your name here. Thanks!

Please mail signed petitions to:

Protect Marriage WA

Mailing Deadline: July 22nd

[Dkt. 59, filed September 3, 2009]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,	)	
Plaintiffs,	)	
v.	)	No. C09-5456BHS
SAM REED, in his official capacity as Secretary of State of Washington, DEBRA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,	)	ORDER AMENDING AND EXTENDING THE COURT'S TRO
Defendants.	)	

This matter comes before the Court on the Court's Order Granting Plaintiffs' Motion for TRO (Dkt. 9).

On July 28, 2009, Plaintiffs John Doe #1, John Doe, and Protect Marriage Washington filed a complaint against Defendants Sam Reed, in his official capacity as Secretary of State of Washington, and Debra Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington. Dkt.

2. Plaintiffs allege that the Washington Public Records Act, Wash. Rev. Code § 42.56.001, *et seq.*, is unconstitutional as it applies to the public release of referenda petitions submitted to the Washington Secretary of State. *Id.* at ¶¶ 61-63. Plaintiffs request injunctive relief against Defendants from releasing the names, addresses, and other contact information of individuals who signed the petition. *Id.*

On July 28, 2009, Plaintiffs also filed a motion for temporary restraining order and preliminary injunction. Dkt. 3. On the same day, the Court held a hearing and indicated that Plaintiffs needed to personally serve Defendants with the motion and provide notice of the hearing which was reset for July 29, 2009 at 2:30 PM. Dkt. 1.

At the hearing held July 29, 2009, Plaintiffs provided a declaration of service and indicated that Defendants did not intend to appear at the hearing. Dkt. 8. After the hearing, the Court issued an Order Granting Plaintiffs' Motion for TRO and enjoined Defendants as follows:

> Defendants are restrained from releasing the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition. The temporary restraining order shall expire on September 3, 2009, or as otherwise ordered by the Court.

Dkt. 9.

On August 28, 2009, Washington Families Standing Together ("WAFST") filed a Motion to Intervene. Dkt. 43. WAFST asserts that it "is examining claims through which it and its individual members might

challenge non-matching signatures on referendum petitions" pursuant to RCW 29A.72.240. *Id.* at 1. WAFST claims that it

> has been precluded by the Court's Temporary Restraining Order from receiving those singatures, and in turn, investigating additional signature mismatches as a basis for challenge under RCW 29A.72.240.

Id. at 1-2. WAFST correctly notes that "[t]his statute is neither mentioned nor challenged in the current briefs. *Id.* at 2. WAFST submitted a Proposed Protective Order requesting that the Court grant an exception to the temporary restraining order so that it may pursue an action under RCW 20A.72.240.

Washington's referendum process and the provisions of RCW 29A.72.240 are beyond the scope of Plaintiffs' complaint as Plaintiffs seek only to enjoin Defendants' compliance with Washington's Public Disclosure Act, RCW 42.56.001 *et. seq.* *See* Dkt. 2. Therefore, the Court will amend the current temporary restraining order as follows:

1. Defendants are restrained from releasing the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition. This restraint shall not interfere with Washington's referendum process or the provisions of RCW 29A.72.240.
2. Intervenor WASFT, including its attorneys and personnel, may access the signatures submitted in support of Referendum 71 through disclosure by the Secretary of State for the sole purpose of examining the petitions and potentially pursuing an action under RCW 29A.72.240, but may not publicly disclose the signatures or the iden-

tity of the signatories during the pendency of this Order or unless such disclosure is authorized by the Court's order on Plaintiffs' motion for a preliminary injunction; and

3. This order does not enjoin any action by a Washington State Court pursuant to RCW Chapter 29A.

Finally the Court will extend the temporary restraining order to consider the oral arguments of counsel and finalize a written opinion on the motion for a preliminary injunction. Therefore, the temporary restraining order will dissolve upon the earliest of September 11, 2009, the issuance of a written decision on Plaintiffs' motion for a preliminary injunction, or further order of the Court.

IT IS SO ORDERED.

DATED this 3rd day of September, 2009.

s/ Benjamin H. Settle
BENJAMIN H SETTLE
United States District Judge

[Dkt. 62, filed September 8, 2009]

MINUTE ENTRY for proceedings held before Judge Benjamin H Settle- Dep Clerk: *Jean Boring*; Pla Counsel: *Sarah E Troupis/Stephen Pidgeon*; Def Counsel: *James Pharris (AG) / Kevin Hamilton (Intv-WA Families) / Steven Dixson (Intv WA Coalition)*; CR: *Julaine Ryen*; Preliminary Injunction Hearing held on 9/3/2009. MOTION [43] to Intervene by Washington Families Standing Together is GRANTED, MOTION [36] to Intervene by Washington Coalition for Open Government is GRANTED; Arthur West's Motion to Intervene was preliminarily DENIED because no motion was posted to the docket as of the time of this hearing. Clerk shall post the motion and the Court will rule after reviewing. Motion [24] to Consolidate Preliminary Injunction Hearing on Count I of Complaint with Trial on the Merits is DENIED. No trial will be set. Court & Counsel review proposed order extending the TRO. Court inquires of counsel the need for a bond should the preliminary injunction be issued. Court amends and extends the temporary restraining order to consider the oral arguments of counsel and will issue a written decision on plaintiffs motion for a preliminary injunction on or before 9/11/2009. Hearing concluded.

Preserve Marriage, Protect Children R-71

"A domestic partnership diverts rights and resources from a family to an unrelated adult. These include benefits for dependent children, end of life decisions by adult children for elderly parents, and inheritance rights of all surviving family members, just to name a few. The homosexual community emphasizes the fact that they have biological children, yet no child is ever produced by a same sex relationship. There is always an opposite sex partner involved and they can lose their rights as well. Please support genuine marriage and sign R-71!"

Senator Dan Swecker

"In 2006 the Washington State Supreme Court upheld the legislature's right to ban same sex marriages. The passage of Senate Bill 5688 this year makes same-sex Domestic Partnerships equal to genuine marriage in every practical way. Its passage has essentially overturned our Defense of Marriage Act (DOMA) and thus diminishes the value of traditional marriage between one man and one woman. I urge you to sign R-71 and help us roll back this effort to undermine marriage in Washington State!"

Senator Val Stevens

"Please Defend Marriage by Signing This Petition. SB 5688 was presented as a bill about benefits, yet a day after it was passed, those who sponsored the bill told the Seattle press that it was really part of a long term strategy to re-define marriage and legalize same-sex 'marriage'. The Seattle Times editorial board agreed and said homosexuals should also be given the name 'marriage' as a result of the passage of SB 5688. SB 5688 is the final step. If this bill is allowed to become law, partnerships will be elevated to the level of marriage with no legal difference. The Washington State Defense of Marriage Act (DOMA) will be declared irrelevant and same-sex 'marriage' will be imposed on Washington State through the courts."

"SB 5688 is an attempt to deconstruct marriage as it has existed throughout all human history. This unique and exceptional relationship that connects a man and a woman to a child, genetically, is the cornerstone of every successful society in human history and is the master plan of the Creator. There is no other relationship that meets the criteria for marriage. Only natural marriage provides generational stability. Please defend marriage by signing the R-71 petition."

Gary Randall, President
Faith and Freedom Network
and Foundation

"At the founding of our country we made the conscious decision to promote marriage between one man and one woman above all other legal unions because of its inherent value to children and society. Signing R-71 will help us preserve that decision for another generation."

State Representative Matt Shea

"SB 5688 was packaged and presented to the legislature as a Domestic Partnerships expansion of benefits. In truth, it will demolish the state's historical understanding and definition of marriage as Washington will immediately become subject to litigation by same-sex partners demanding the courts overturn our state's Defense of Marriage Act and impose "same-sex marriage" as happened recently in California prior to Proposition 8. By signing Referendum 71, we will bring this sweeping change measure before the people of Washington State and let them make this monumental decision in November."

Larry Stickney, President
Washington Values Alliance

"Those who think they can at this battle and be sure they believe their values and their children will be safe in a private school or home school, need to think again. If the homosexual extremists are allowed to continue down this path, which expanded civil rights and hate crime laws, it will soon be illegal to speak out against homosexual marriage or the dangerous homosexual lifestyle. Please protect the time-honored tradition of natural and modern society - one man, one woman in marriage. Protect the rights of children to have a mother and a father. Please do not hesitate to sign the R-71 petition."

Pastor Ken Hutcherson,
Antioch Bible Church

"Please sign R-71 right away. SB 5688 is bad legislation for marriage, bad for the public schools and the economy. It's a back door way of legalizing homosexual marriage without the name -which will be next. That step would legitimize immoral behavior-- forcing many families and their children to leave the public schools, and costing the state millions of dollars on a crazy social experiment. People are free to live with anybody they want -but they don't have the right to change the bedrock of society--marriage--between a man and woman, producing, protecting, and nurturing children. We need to honor and strengthen marriage--not re-define it."

Ron Boehme, US Renewal

Before you mail in your petition, make sure to print and sign your name here. Thanks!

(PRINT FIRST NAME) (PRINT LAST NAME)

I, _____ _____,

sworn or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, each violation being punishable by fine or imprisonment or both.

Signature _____

Please mail signed petitions to:

Protect Marriage WA

P.O. Box 501 Arlington, WA 98223 (425) 491-7753

www.ProtectMarriageWA.com E-mail: R71@ProtectMarriageWA.com

Mailing Deadline: July 22nd

Paid for by Protect Marriage WA P.O. Box 501, Arlington, WA 98223

BEST AVAILABLE COPY

Preserve Marriage, Protect Children R-71

Highlights

- The legislature just passed a law that effectively makes same-sex marriages legal. By signing R-71 we can reverse that decision and protect marriage as between one man and one woman.
- If same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal...even over the objections of parents. Sign R-71 to protect children.

Ballot Measure Summary

Same sex couples, or any couple that includes one person age sixty-two or older, may register as a domestic partnership with the state. Registered domestic partnerships are not marriages, and marriage is prohibited except between one man and one woman. This bill would expand the rights, responsibilities, and obligations of registered domestic partners and their families to include all rights, responsibilities, and obligations granted by or imposed by state law on married couples and their families.

WARNING:

Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.

Ballot Title

Statement of Subject: The legislature passed Engrossed Second Substitute Senate Bill 5688 concerning rights and responsibilities of state-registered domestic partners (and voters have filed a sufficient referendum petition on this bill).

Concise description: This bill would expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses, except that a domestic partnership is not a marriage.

Should this bill be:

☐ Approved ☐ Rejected

To the Honorable Sam Reed,
Secretary of State of the State of Washington

We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that the foregoing Measure No. 71, (Concerning a bill that would expand the rights, responsibilities, and obligations accorded to state-registered same-sex and senior domestic partners and their families to include all rights, responsibilities, and obligations granted by or imposed by state law on married spouses, except that a domestic partnership is not a marriage and not to be called by the same name as marriage) ordered submitted to the legislature of the State of Washington at the last regular session of said legislature, shall be submitted to the people of the state for their approval or rejection at the general election to be held on the first day of November, 2009, and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington in the city (or town) and county written after my name; my residence address is correctly stated; and I have knowingly signed this petition only once.

All Washington State voters may sign this statewide referendum. Print and sign clearly!

	Printed Name of Registered Voter	Signature of Voter	Your Home Address	City / County	Email Address (optional)
0	JOHN Q. CITIZEN	John Q Citizen	71 All the Way	Arlington / Snohomish	R71@ProtectMarriageWA.com
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					

Mail to: Protect Marriage WA • *Mailing Deadline: July 22nd*

P.O. Box 501, Anacortes, WA 98221 (425) 451-7753 www.ProtectMarriageWA.com E-mail: R71@ProtectMarriageWA.com

Pages 1 and 12 from
Exhibit A to the Declaration of
Catherine S. Blinn
(District Court)

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 25 2010
OFFICE OF THE CLERK

No. 09-559

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners*

v.

Sam Reed et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Brief

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February 25, 2010

BOTH 5E06I1

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Questions Presented

The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot ("petition signers"). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny. The questions presented are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

Parties to the Proceeding

Petitioners in this Court, Plaintiffs-Appellees below, are John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington, a state political committee and proponent of Referendum 71.

Respondents in this Court, Defendants-Appellants below, are Sam Reed, in his official capacity as Secretary of State of Washington, and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington.

Additional Respondents in this Court, Defendants-Intervenors-Appellants below, are Washington Coalition for Open Government and Washington Families Standing Together.

Corporate Disclosure Statement

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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Opinions Below

The appellate order (CP-App.[1] 1a) reversing the district court is reported at 586 F.3d 671 (9th Cir. 2009). The district court's order and opinion granting a preliminary injunction (CP-App. 23a) is unreported.

Jurisdiction

The appellate court's order (CP-App. 1a) was filed on October 15, 2009. The appellate court's opinion and judgment (CP-App. 3a) was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The following are in the certiorari petition appendix: First Amendment (CP-App. 46a); Fourteenth Amendment (CP-App. 46a); Washington Constitution, article II, § 1(b) (CP-App. 46a); Revised Code of Washington ("RCW") § 29A.68.011 (CP-App. 47a); RCW § 29A.72.200 (CP-App. 48a); RCW § 29A.72.230 (CP-App. 49a); RCW § 29A.72.240 (CP-App. 50a); RCW § 29A.84.210 (CP-App. 51a); RCW § 29A.84.230 (CP-App. 51a); RCW § 29A.84.250 (CP-App. 52a); RCW § 42.17.010 (CP-App. 53a); RCW § 42.56.001 (CP-App. 55a); RCW § 42.56.010 (CP-App. 56a); and RCW § 42.56.070 (CP-App. 56a).

---

[1] **Abbreviations:** Certiorari Petition Appendix ("CP-App."); Democratic National Committee ("DNC"); Freedom of Information Act ("FOIA"); Public Records Act ("PRA"); Referendum 71 ("R-71"); Revised Code of Washington ("RCW"); Secretary of State ("Secretary"); State Respondents ("State").

Statement of the Case

A. Background[2]

This case arose in the wake of events in California.[3] On November 4, 2008, California passed Proposition 8, defining marriage as between one man and one woman. During and after the campaign, Proposition 8 opponents publicized on the Internet the names, employers, and contact information of Proposition 8 campaign contributors from public filings to harass and intimidate them. *See, e.g.*, www.eightmaps.com; www.californiansagainsthate.com. These intimidation efforts were widely reported, and this Court called them a "cause for concern." *See Citizens United v. FEC*, No. 08-205, slip op. at 54 (Jan. 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)).[4] *See also Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (2010) (per curiam) (staying broadcast of Proposition 8 trial; recognizing harassment directed at Proposition 8 supporters).[5]

---

[2] In not redacting obscene language herein, Petitioners followed *Cohen v. California*, 403 U.S. 15, 16 (1971).

[3] Additional facts are in the district court Opinion. (CP-App. 23a.)

[4] All citations are to the slip opinion.

[5] Proposition 8 supporters seek an as-applied exemption from campaign finance reporting requirements under *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). *See ProtectMarriage.com v. Bowen*, No. 2:09-cv-00058-MCE-DAD (E.D. Cal.). Supporters were denied a preliminary injunction preventing disclosure of additional names, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009), after which a previously undisclosed contributor received this email:

The judge released the names today of the donors who

The intimidation campaign was facilitated by the compelled disclosure of contributors to committees supporting Proposition 8. (*See generally* Dkt. 4, Ex. 12 at 10-15, 27-45, 45-51, 52-57; Dkt. 4, Ex. 13 at 2-6, 35-38, 43-45, 46-51, 70-75, 76-80, 81-118, 119-36, 143-45, 235-38, 239-45.) Campaign reports facilitated boycotts and blacklists of businesses owned by, or employing, traditional marriage supporters. (*See* Dkt. 4, Ex. 12 at 2-9 (organized protest at business and numerous reports of boycotts).)[6]

Websites combined campaign-report information with publicly available contact information enabling Proposition 8 opponents to harass donors at home and work. *See, e.g.*, www.californiansagainsthate.com; www.eightmaps.com.

> supported Prop 8, and your name is on the list as having donated . . . to keep same-sex couples from marrying. Someday you will have to account for the fact that you refused to love they [sic] neighbor, but in the meantime I hope your hateful little life is full of oppression and injustice as this is the kind of life you wish for others. You're a queer-hating douchebag. Fuck you. Best, Julia

(Dkt. 4, Ex. 13 at 243.) Trial is scheduled for March 14, 2011.

[6] *See also* Dkt. 4, Ex. 12 at 27-45 (received email stating, "I AM BOYCOTTING YOUR ORGANIZATION AS A RESULT OF YOUR SUPPORT OF PROP 8"); *id.* at 46-51 (received email suggesting that business would suffer for contributing $100 to support Proposition 8); Dkt. 4, Ex. 13 at 70-75 (name posted on Internet "Boycott H8ers List"); *id.* at 81-118 (boycott of artist threatened); *id.* at 70-75 (received email stating, "Your company is now on a list I am producing of those that will be boycotted and shut down soon").

As a result, Proposition 8 supporters became death threat targets.[7] Others feared physical harm to self or family. (*See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (feared physical violence at sign-waving; refused to bring children to events; worried about future violence to family for supporting similar causes).)[8]

Others saw their car windows broken, homes vandalized, and cars spray-painted and scratched because they supported Proposition 8. (*See, e.g., id.* at 7-9 (rear window of car smashed while parked in front of declarant's house); *id.* at 10-12 (car scratched and tires deflated; staircase from home covered in urine with puddle of urine at bottom).)[9]

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[7] *See* Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (KFSN-TV), Oct. 31, 2008, http://abclocal.go.com/kfsn/story?section=news/local&id=6479879 (death threat directed at Fresno mayor for support of Proposition 8); (Dkt. 4, Ex. 13 at 120 (email stating "I tolerate you because I don't come to where you are and slaughter you")).

[8] *See also* Dkt. 4, Ex. 13 at 39-42 (incidents "shook" declarant "to the core"); *id.* at 43-45 (donor in Louisiana worried someone "could go after" her family in California); *id.* at 46-51 (would not host wave party without man present over concerns for participants' safety); *id.* at 58-60 (concerned about safety of children and instructed principal that only he or wife could pick them up from school); *id.* at 119-36 (will not speak out publicly in future for "fear for the safety of children"); *id.* at 164-66 (did not display a bumper sticker because of aggression directed toward family and friends who supported Proposition 8); *id.* at 194-97 (would have to "seriously consider . . . the safety of family in the future when deciding to support a [similar] cause"); *id.* at 223-34 (fears for safety and safety of daughters).

[9] *See also* Dkt. 4, Ex. 13 at 13-16 (car heavily scratched); *id.* at 17-20 (home egged and floured multiple times; car egged,

Another supporter feared jeopardy to her job for supporting Proposition 8. (*Id.* at 31-34.) The fear is well-founded because news media report that individuals were fired or forced to resign for supporting traditional marriage.[10] Reports include a waitress forced to resign to end relentless protests outside restaurant after her $100 contribution became public, as well as forced resignations in the theater industry. *See* Karen Grigsby Bates, *Backers Of Calif. Gay Marriage Ban Face Backlash*, NPR, Mar. 5, 2009, www.npr.org/templates/story/story.php?storyId=101460517&ft=1&f=100.[11]

Peaceable assembly during the Proposition 8 campaign brought harassment. (*See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (participated in 6-7 sign-waving events; at each, people shouted obscenities, made obscene gestures, and argued with Proposition 8 supporters).)[12]

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floured, and honeyed multiple times; motorbike tipped over); *id.* at 61-63 (bumper sticker ripped off in shopping area); *id.* at 67-69 (bumper sticker ripped off at school).

[10] In this economy, reprisals targeting employment are particularly chilling and have become a common tactic of same-sex marriage supporters. *See* A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009, www.bangordailynews.com/detail/130565.html (complaint by National Association of Social Workers against school counselor supporting traditional marriage).

[11] The continued availability of information about Proposition 8 contributors permits ongoing retaliation. A 95-year-old board member of a California theater recently lost his position for supporting Proposition 8. Phillip Matier & Andrew Ross, *Prop. 8 Aid Puts Paramount Board Member on Hold*, Deseret News, Jan. 23, 2010, www.deseretnews.com/article/705360460/Prop-8-aid-puts-Paramount-board-member-on-hold.html.

[12] *See also* Dkt. 4, Ex. 13 at 31-34 (called a "filthy bag of

Even churches were not safe havens for Proposition 8 supporters. One supporter's pastor told her to find another church, though she attended a church whose teachings support traditional marriage. (Dkt. 4, Ex. 13 at 212-15.)

Another Proposition 8 supporter reported that police provided no assistance after receiving theft and vandalism reports related to Proposition 8. (*See id.* at 173-82 (reported yard sign theft and vandalism to police on three separate occasions, but received no response).) Another supporter did not report yard-sign theft believing police would provide no assistance. (*See id.* at 198-201 (declarant did speak to police dispatcher).)

The result of these actions is that individuals are intimidated from engaging in political speech. Proposition 8 donors report that they will not contribute to similar organizations in the future because of the harassment that occurred when contributions became public.[13] Though most prevalent in California, intimi-

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shit" and "bitch" while holding pro-Proposition 8 sign on street corner; unknown object thrown at declarant waving sign); *id.* at 64-66 (people passing peaceful pro-Proposition 8 demonstration made obscene gestures and yelled obscenities); *id.* at 249-52 (people regularly made obscene gestures and yelled at people participating at wave parties).

[13] *See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (will hesitate before supporting a similar cause because of worry about harassment, violence, and potential discrimination against family and fear of damage to property); *id.* at 43-45 (will think twice before supporting similar cause); *id.* at 70-75 (will be less likely to get involved in similar cause if confidentiality cannot be assured); *id.* at 194-97 (hopes to support similar cause in the future, but will first consider safety of family); *id.* at 219-22 (will hesitate before future giving because no way to ensure confidentiality).

dation efforts have been directed at supporters of traditional marriage across the country.[14]

B. Referendum 71

On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688. (CP-App. 29a.) It expands the rights, responsibilities, and obligations accorded state-registered, same-sex and senior-domestic partners to equate to those of married spouses and is commonly called the "everything but marriage" domestic partnership bill. (CP-App. 7a., 29a.)

In May 2009, Protect Marriage Washington began circulating Referendum 71 ("R-71"), a referendum petition on Senate Bill 5688. (CP-App. 29a.) The Washington people have reserved the power to repeal acts of their legislature. Wash. Const. art. II, § 1(b). To do so they must submit a petition evidencing sufficient support to warrant a referendum. *Id.* Then an election asks the people to "approve" or "reject" the legislation. *See* RCW § 29A.72.290.

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[14] KnowThyNeighbor.org, who intended to place Referendum 71 petition signers on the Internet, posted the names of traditional marriage supporters signing petitions in Arkansas, Florida, Massachusetts, and Oregon. *See* www.knowthyneighbor.org. *See also*, Joshua Rhett Miller, *Massachusetts Man Says He Was Fired for Telling Colleague Her Gay Marriage Is Wrong*, FoxNews.com, Nov. 9, 2009, www.foxnews.com/story/0,2933,572862,00.html; Kevin Miller, *Yes on 1 Advocate Targeted After TV Ad*, Bangor Daily News, Oct. 30, 2009, www.bangordailynews.com/detail/ 127393.html (campaign to strip guidance counselor of license after appearing in ad supporting traditional marriage); News 13, *Swastikas Painted on 'Yes on One' Signs*, MyFOXMaine.com, Oct. 28, 2009, www.myfoxmaine.com/dpp/news/20091028_swastikas_painted_on_yes_ on_one_signs.

On July 25, Protect Marriage Washington submitted a petition containing more than 138,500 signatures to the Secretary of State ("Secretary"). (CP-App. 20a.) Petitioners John Doe #1 and John Doe #2 signed the petition. (J.A. 6-7.) The Secretary conducted an extensive canvass and verification of the petitions and determined that R-71 qualified for the November ballot.[15]

While Protect Marriage Washington was collecting signatures, several groups stated that they intended to utilize the Washington Public Records Act ("PRA"), RCW § 42.56.001 et seq., to obtain copies of petitions submitted to the Secretary.[16] KnowThyNeighbor.org and WhoSigned.org stated publicly that they intended to place the names and addresses of R-71 petition signers on the Internet to encourage "uncomfortable conversations." (CP-App. 31a.)[17] The Secretary stated

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[15] The State must destroy petitions failing to qualify. RCW § 29A.72.200. The Secretary intended to release copies of the petitions before R-71 was certified. David Ammons, *R-71 Update: Signature Requests Pending*, Wash. Sec'y of State Blogs, July 29, 2009, http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/07/r-71-update-signature-requests-pending. If referendum petitions are public records subject to disclosure under the PRA *before* they are certified for the ballot, the statute authorizing their destruction if they are not certified is rendered superfluous. *See United States v. Menasche*, 348 U.S. 528, 538 (1955) ("give effect, if possible, to every clause and word of a statute").

[16] The PRA, provides for release of certain public records and is similar to the federal Freedom of Information Act ("FOIA"). *Compare* RCW § 42.56.001 et seq. *with* 5 U.S.C. § 552.

[17] Individuals have used access to referendum petitions on other issues to harass petition signers and stifle debate. For

his intent to comply with requests for copies of R-71 petitions.[18] Ammons, *R-71 Update*, *supra*.

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example, in West Virginia the Fraternal Order of Police, after being denied access by the city clerk, obtained a court order granting access to referendum petitions to repeal an ordinance requiring two police officers in every cruiser. Casey Junkins, *Recht: Give FOP the Signatures*, The Intelligencer: Wheeling News-Register, Nov. 5, 2009. Police access of petition signer identity is chilling. *See also The Shepherdstown Observer v. Maghan*, No. 09-c-169, Order of Dismissal at 6 (Jefferson County, W.Va. 2009) ("[M]aking the names of those individuals who signed the petitions [public] would have a chilling effect on the ability of citizens to petition the government."; newspaper's request for access to referendum petition denied) (*available at* http://jeffersoncountyclerkwv.com).

See also Brief *Amici Curiae* of Common Sense for Oregon, the Oregon Anti-Crime Alliance, and Oregonians in Action in Support of Petitioners, *Doe #1 v. Reed*, No. 09-559 at 15-19 (U.S. 2010) (discussing successful harassment campaign directed at elderly widow circulating recall petition; petitions destroyed to protect supporters from harassment).

[18] The State's position that referendum petitions are "public records" departs from nearly 70 years of precedent. Attorney general opinions from 1938 and 1956 declare that petitions are not public records subject to disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956). Even after the PRA was enacted, then-Secretary of State Kramer declared that petitions were not subject to public release, *see* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973 (CP-App. 66a), because "the release of these signatures [has] no legal value, but could have deep political ramifications to those signing." A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973. (CP-App. 67a.) This position was later confirmed by the state courts. *Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

That petitions are not "public records" is also supported by the fact that petitions are not made public by statutes regulat-

C. Litigation

Fearing Proposition 8 intimation would repeat in Washington, Petitioners sued on July 28, 2009, alleging that the PRA violates their First Amendment rights. (J.A. 4-19.) In Count I, Petitioners' complaint asserted that the PRA is unconstitutional as applied to referendum petitions because it violates the interest in privacy of identity, association, and belief. (J.A. 16.) Count II asserted that the PRA is unconstitutional as applied because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals." (J.A. 17.)

In addition to the Proposition 8 intimidation evidence, Petitioners submitted evidence that history was repeating itself in Washington because individuals publicly associated with R-71 had been subjected to intimidation efforts. For example, Larry Stickney, the campaign manager for Protect Marriage Washington, received many harassing and threatening emails. (J.A. 9.) One said: "You better stay off the olympic peninsula. . it's [sic] a very dangerous place filled with people who hate racists, gay bashers and anyone who

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ing referenda. *See* RCW § 29A.72.010 et seq. Proponents and opponents of a referendum are permitted to have observers at the Secretary's verification, but observers may not make any record of names, addresses, or other information on the petitions. RCW § 29A.72.230. Where the Secretary determines that the collected signatures are inadequate (and a court confirms, if appeal is taken), the petitions are destroyed. RCW § 29A.72.200. As drafted, these statutes only divulge the names of petition signers to the referendum proponents and government for a very limited purpose—to allow public officials to verify the petition signatures and ensure sufficient support to justify placing referenda on the ballot.

doesn't believe in equality. Fair is fair." (*Id.*) Another: "Dear God fearing hate mongerers[. . . .] Maybe you just want to feel a cock in your ass and hate yourself for it. Whatever. Praise Jeebus you retarded fuckholes!" (*Id.*)

A local blogger stated: "If Larry Stickney can do 'legal' things that harm OUR family, why can't we go to Arlington, WA to harm his family?" (J.A. 10.) Stickney took the threat seriously, reported it to the sheriff, and had his family sleep in an interior room to protect them. (J.A. 9-10.)

Boycotts were threatened: "We shall boycott the businesses of EVERYONE who signs your odious, bigoted petition." (J.A. 9.)

On September 10, the district court preliminarily enjoined the Secretary from releasing copies of the R-71 petition sheets. (CP-App. 23a.) It applied strict scrutiny, holding that Petitioners established likely merits success and satisfied other preliminary injunction factors. (CP-App. 43a.) The court did not reach Count II, which sought an exemption based on a reasonable probability of threats, harassment, and reprisals. (CP-App. 23a-45a.)

On October 15, the Ninth Circuit stayed the injunction, effective immediately, stating simply that the disctrict court applied "an incorrect legal standard." (CP-App. 2a.) On October 19, Justice Kennedy stayed release of the petition. (CP-App. 22a.) On October 20, this Court extended the stay. (CP-App. 21a.) The Ninth Circuit issued its opinion on October 22, saying the district court applied an "erroneous legal standard when it applied strict scrutiny." (CP-App. 20a.) Applying intermediate scrutiny, the Ninth Circuit found the PRA likely constitutional as applied to referendum

petitions. (CP-App. 20a.) It neither considered Petitioners' Count II nor remanded for application of the reasonable-probability test. (CP-App. 4a-20a.)

Summary of Argument

There are two great enemies of citizen participation in our Republic, corruption and intimidation in elections. Much attention has been paid to preventing corruption, but this case is about protecting the people from intimidation while engaging in core political speech. While the case involves the reversal of the grant of a preliminary injunction, at its core lies the First Amendment question of whether, when the sovereign people seek to put a referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about themselves, their association, and their belief that a measure should be on the ballot or whether any State interests are satisfied by *private* disclosure to the government.

The compelled disclosure of speech here implicates the First Amendment's protections created to safeguard citizens engaged in self-government, and this Court has recognized that the petition-signing discussion is core political speech.

Washington imposes three levels of compelled speech that must each be justified. First, in order to put a referendum on the ballot, people must speak and associate to qualify the referendum. Second, they are compelled to speak when they submit signatures to the Secretary for canvass and verification. As to these two levels, there is no fear of intimidation and no waiver of privacy rights. But as to the third level of compelled speech, *public* disclosure, there is a serious concern over both loss of privacy and intimidation.

Strict scrutiny applies to the petition-signing discussion, as this Court has recognized. Petition signing is integral to, and the goal of, this protected discussion, so burdens on it are necessarily subject to strict scrutiny. Strict scrutiny also applies because the burden is on core political speech; privacy of identity, association, and belief are burdened, including revealing how petitioners will vote; Washington's scheme has viewpoint discrimination; and Washington's scheme is content-based. Moreover, the evidence of serious disclosure costs indicates that the burden is serious so scrutiny must be strict.

The State's asserted interests in public disclosure are neither compelling nor important. The informational interest is weak, even if there is an information interest simply in who signed a petition, which is doubtful. To the extent that signers only intended to indicate that a question should be decided by the people, there is no cognizable informational interest. To the extent that signers indicated how they would vote, the secret-ballot interest protects from disclosure. The anti-fraud interest is neither compelling nor important. Fraud is of less concern in signature gathering than in voting. Fraud prosecution is rare. And though petitions have been subject to release in recent years, no fraudulent signature has been detected by such release.

Public disclosure is neither narrowly tailored nor sufficiently related to any informational interest. There is already adequate disclosure about proponents and contributors, and the State's long history of not disclosing petition signers reveals that this more narrowly-tailored approach adequately serves any state interests. Disclosure of de minimis involvement, as with de

minimis contributions, simply does not serve any state interest. Public disclosure is neither narrowly tailored nor sufficiently related to any anti-fraud interest. There is private disclosure to the Secretary, which serves the State's interest in assuring that there is adequate public support for a referendum, and the Secretary and observers canvass and verify petition signatures. This, along with the option of creating non-public review mechanisms and the presence of criminal penalties, satisfies any anti-fraud interest.

Petitioners properly received a preliminary injunction. In First Amendment cases, preliminary injunction standards should be protective of First Amendment rights. From the foregoing, it is clear that Petitioners had a likelihood of success on the merits. The other preliminary injunction standards follow from that conclusion. Petitioners had irreparable harm because deprivation of First Amendment rights is always irreparable harm. And if petition-signers' identities had been publicly disclosed, there was no way to reverse the disclosure. Balancing the equities favored Petitioners, given their risk from disclosure and the anemic nature of the asserted State interests. It is always in the public interest to protect constitutional rights.

Argument

In 1884, this Court said that "the two great natural and historical enemies of all republics . . . [are] open violence and insidious corruption," *The Ku-Klux Cases*, 110 U.S. 651, 658 (1884), and that "the temptations to control . . . elections by violence and corruption is a constant source of danger." *Id.* at 667. That case involved men charged with "conspir[ing] to intimidate" a man "in the exercise of his right to vote for a member

of the Congress of the United States." *Id.* This Court said that "it is indispensable to the proper discharge of the great function of legislating . . . that those who are to control this legislation shall not owe their election to bribery or violence." *Id.* at 663. And this Court said that the choosing of legislators should be as much the "free choice of the people" as was the act of the people in creating the United States. *Id.* at 666.

This case involves the "free choice of the people" in petitioning to put a referendum on the ballot. Intimidation and corruption remain enemies. The State argues corruption and downplays intimidation. But overemphasis on fighting corruption, by requiring disclosure at low levels of contribution or involvement, can enable intimidation. And corruption is virtually nonexistent in the petition-signing context, while intimidation is clearly resurgent here. This Court has decided many cases involving protection against corruption. This case requires the Court's protection to assure that "the very sources of power . . . [are not] controlled by violence and outrage." *Id.* at 667.

While this case involves the reversal of the grant of a preliminary injunction, its core is the First Amendment issue of whether, when the sovereign people seek to put a referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about *themselves*, their *association*, and their *belief* that a measure should be on the ballot or whether any State interests are satisfied by *private* disclosure to the government. And this issue should be decided with attention to a backdrop of intimidation.[19]

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[19] This First Amendment issue is addressed in Parts I-IV, which establish likely success on the merits and is the central focus of the preliminary-injunction analysis in First Amend-

I. Public Disclosure Here Implicates First Amendment Protections.

The Ninth Circuit "assume[d], as did the district court, that the act of signing a referendum petition is speech, such that the First Amendment is implicated." (CP-App. 11a.) But it noted that "[t]he State contends, with some force, that signing a referendum is not speech, but is instead, a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people . . . ." (CP-App.11a n.9.) The courts below were correct that this case involves core "political speech" (CP-App. 13a), and for that reason alone First Amendment protections engage. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (Roberts, C.J., joined by Alito, J.) ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny.").[20] In addition, three lines of cases establish that protected speech is involved—cases involving compelled speech, privacy, and intimidation. Moreover, the First Amendment right to petition is implicated here, providing its own protections.[21]

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ment cases (with the other elements essentially following this determination).

[20] This opinion ("*WRTL-II*") states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

[21] Broad protections are afforded under the right to petition, but since this Court analyzed the petition-signing discussion at issue here under the speech right, *see infra*, Petitioners emphasize that analysis. *See Brief of Justice and Freedom Fund as Amicus Curiae Supporting Petitioner* (briefly discussing applicability of petition right here),

A. Petition Signing Is Political Speech.

The courts below were correct that First Amendment protections engage because this case involves core "political speech" (CP-App. 13a). First, this Court has already decided that the petition circulation discussion at issue here is protected by the First Amendment. The Ninth Circuit noted that the district court relied on *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197 (1999) ("*Buckley-II*"), to establish this. (CP-App. 13a.) *Buckley-II* decided that the First Amendment protects referendum petition circulators, *id.* 197-200, because collecting signatures is "core political speech," *id.* at 186. The petition-signing discussion "involves both the *expression* of a desire for political change and *discussion* of the merits of the proposed change." *Id.* at 199 (*citing Meyer*, 486 U.S. at 421) (emphasis added). This case involves that same "expression" and "discussion." A signature on the proffered petition sheet is integral to, and the goal of, this "discussion." The State cannot explain how the discussant on one side of the clipboard in a protected "discussion" is protected but the discussant on the other side is not, especially when "expressi[ng the same] . . . desire for political change." *Id.*

Second, the State's argument that speech is not involved implicitly rests on the erroneous premises of (a) primacy of government by legislators over government by the people and (b) waiver of First Amendment protections when the people act sovereignly. Regarding primacy, the people are sovereign, so self-government is the primary, presumed form of governance. U.S. Const. pmbl. The people may elect representatives, U.S. Const. art. I, § 1, but "the people are sovereign,"

Buckley v. Valeo, 424 U.S. 1, 14 (1976). The people of Washington similarly granted and reserved powers. The State's assertion that when the people govern directly they are stripped of rights reverses our constitutional presumption. Moreover, if citizens acting sovereignly are somehow like their representatives, then ethics standards governing representatives should apply to citizens (rules about gifts, recusal for conflicts, etc.), which does not happen. And if citizens are really like their representatives, they should have the protections afforded representatives, as in the "privilege[] from Arrest" and "Speech or Debate" clauses, U.S. Const. art. I, § 6. Lacking those protections, citizens need First Amendment protection.

Regarding waiver, the First Amendment does not exclude from its protection those acting sovereignly to qualify and enact referenda. *See Buckley-II*, 525 U.S. at 192 ("the First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas"). The First Amendment's central purpose is to protect self-governance, *see Citizens United*, at 12 ("political speech . . . is central to the meaning and purpose of the First Amendment"), so its protection cannot disappear when that purpose is being fulfilled.[22]

Third, if people acting in their sovereign capacity lose First Amendment protections, then *voters* would lose First Amendment protections. Those voting on referenda act in their sovereign capacity, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 n.31

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[22] The notion that petition-signers waive privacy interests by signing multi-signer forms reviewed by referendum proponents and government officials is addressed further below. *See infra* at 36 n.34, 36 n.35, 38 n.36.

(1978) ("people . . . take action in their sovereign capacity"), as do voters for candidates, *Buckley*, 424 U.S. at 14 ("people are sovereign . . . [in] mak[ing] . . . choices among candidates"). While it is unnecessary here to decide whether the Constitution requires secret ballots, there are strong arguments that the First and Fourteenth Amendments protect voting privacy, which would be undercut by a holding that petition signing and voting are beyond constitutional protection.[23] In *Burson*, the (four-member) plurality spoke of the "widespread and time-tested consensus" on the necessity of the secret ballot and private polling booth, 504 U.S. at 206, and noted that the (three-member) "dissent concedes that a secret ballot was necessary to cure electoral abuses," *id.* at 207. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), this Court cited the "reasoning" in *Talley v. California*, 362 U.S. 60 (1960),[24] as "embrac[ing] a respected tradition of

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[23] "[A]ll 50 states, together with numerous other Western democracies . . . [require] a secret ballot" to prevent "intimidation" and "fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality decision). For example, Washington requires that "[t]he legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." Wash. Const. art. VI, § 6. The United Nations declares the secret ballot a human right. United Nations Declaration of Human Rights, art. 21 ("The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic . . . elections . . . by universal and equal suffrage and . . . by secret vote or by equivalent free voting procedures.") (*available at* www.un.org).

[24] *Talley* protected the right to circulate handbills advocating a boycott without printing on them the names and addresses of those sponsoring, preparing, and distributing them because "identification and fear of reprisal might deter

anonymity in the advocacy of political causes," *McIntyre*, 514 U.S. at 343, adding: "This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation," *id.*[25]

Fourth, here the right to vote is inextricably tied to petitioning to put the matter to a vote, so petition signers have the First Amendment protections that voters receive. The Sixth Circuit in *Anderson* struck a candidate-petition provision requiring signers to declare their intent to vote for the candidate because it violated the right to a secret ballot. *See supra* n. 25. The Eighth Circuit overturned the U.S. Department of Agriculture's decision to release petitions (under FOIA) because "those signing the petition . . . declared their

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perfectly peaceful discussions of public matters of importance." *Id.* at 65.

[25] *See also Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981). *Anderson* said that "[a]lthough the US Constitution does not specifically guarantee that a person has a right to a secret ballot, such a right has been recognized as one of the fundamental liberties of our democracy." *Id.* (*citing Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *rev'd on other grounds*, 424 U.S. 1); *United States v. Executive Comm. of Democratic Party of Greene County, Alabama*, 254 F. Supp. 543, 546 (N.D. Ala. 1966). *Anderson* noted that Kentucky required a secret ballot and struck the State's requirement that signers of a petition to put a candidate on the ballot declare "their "'desire . . . to vote for the candidate,'" *id.* at 608, because it "abridge[d] the right to a secret ballot," *id.* at 608-09. The court noted that this disclosure provision "operates to discourage citizens from participation" by "invok[ing] the fears sought to be quelled by the secrecy of voting laws in this country," e.g., "pressure of . . . neighbors, employers, and social peers," *id. at* 608-09 (elaborating pressures), and was unconstitutional.

position on the ultimate issue," *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000), and "[r]eleasing this petition . . . would substantially invade th[e] privacy interest [in a secret ballot]," *id.* In the present case, there are similar indications of how petition signers would vote. The petition form says, in a prominent "[h]ighlights" box, that "[b]y signing R-71 we can reverse that decision and protect marriage as between one man and one woman"[26] and that one should "[s]ign R-71 to protect children." (J.A. at 31.) The required "official" language on these forms (below the "[h]ighlights" box in smaller fonts) is neutral, so some signers reading that may have merely intended to put the matter before the voters without expressing an opinion on the issue, as the district court noted. (*Id.*); (CP-App. 42a-43a.) These possibilities create a tension dooming public disclosure in either of two ways: (a) if people signed just to put the issue on the ballot without expressing a view on the merits, then the State's cognizable information interest vanishes, *see infra* Part III.A, (b) but if they indicated their voting preference, the secret-ballot privacy interest protects against public disclosure. The State insists that petition signing was a *legislative* act, which means signers expressed how they would *vote*, which means the signing is protected by the secret-ballot privacy interest. Moreover, the right to vote and petition-signing are inextricably intertwined because

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[26] The petition is for a referendum to *overturn* a legislative act granting everything-but-marriage status outside traditional marriage This posture differs from petitions for an initiative to let voters make the initial policy choice. Here, voters *approving* the legislature's act would be less likely to sign the R-71 petition, while those disapproving would be more likely to sign.

referenda qualification controls voting opportunities—if groups can keep measures off the ballot, the result is the same as winning the vote.

Fifth, this intertwining is further evidenced by the fact that the twin dangers requiring secret-ballot privacy threaten referendum qualification: "[T]he two great natural and historical enemies of all republics . . . [are] open violence and insidious corruption," *The Ku-Klux Cases*, 110 at 658. In 1884, this Court asked whether government "has the power to protect the election[,] on which its existence depends, from violence and corruption," *id.*, by those who "conspired to intimidate" a man "in the exercise of his right to vote," *id.* at 657. Noting that "'[t]he government of the United States was created by the free voice and joint will of the people,'" *id.* at 666 (citation omitted), this Court held that "[i]t is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, *as that the original form of it should be so*," *id.* (emphasis added). The people acting as sovereigns must be protected from both intimidation and corruption if our system of government is to work. "In a republican government . . . the temptations to control these elections by violence and corruption is a constant source of danger." *Id.* "[I]f the very sources of power may be poisoned by corruption or controlled by violence and outrage . . . then, indeed is the country in danger . . . ." *Id.* The secret-ballot privacy interest has been recognized to prevent these twin harms of corruption and intimidation, i.e., the need "to cure electoral abuses" and to be able to vote one's conscience without fear of retaliation, *Burson*, 504 U.S. at 207. This Court has addressed the corruption threat. This case presents the need to protect against the intimidation threat

that has again become a problem. Disclosure rules pose little harm when all are committed to "the free choice of the people." *Ku-Klux Cases*, 110 U.S. at 666. But if one side of a public debate seeks to win by intimidation, the republic's foundation is threatened. If intimidation is unchecked, it is encouraged. Then victory is based on intimidation, not free debate and decision. Then many intimidation targets will be silenced and withdraw from political participation and some will likely feel compelled to respond in kind since the rules have changed, but either approach endangers the republic. Recognizing that petition-signing is within the pale of First Amendment protection here is a step toward preventing this danger. In any event, those intent on winning by intimidation thought that the petition signers were expressing their voting preference and so were engaging in core political speech, and the analysis should proceed accordingly.

B. The First Amendment Protects Against Compelled Speech, Privacy Violation, and Intimidation.

Because petition-signing is core political speech, it is specially protected by the First Amendment. *See supra*. But the First Amendment also protects against compelled speech, privacy violation, and intimidation.

Regarding *compelled speech*, the right to speak necessarily includes the right not to speak.[27] All forms

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[27] Absent a compelling interest, government may not compel speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publication of candidate reply); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (disclosure of membership lists for tax purposes absent showing group is subject to licensing or tax requirement); *West Virginia State*

of campaign disclosure compel speech, *cf. McIntyre*, 514 U.S. at 355 ("compelled self-identification"), in an area of core First Amendment protection. To put referenda on the ballot, Washington voters are forced to submit to three levels of compelled speech. *See infra* Part I.D.

Regarding *privacy*, the First Amendment protects privacy of identity, association, and belief. *See Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"); *id.* at 66 ("the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations"); *id.* 75 ("strict standard of scrutiny" required "for the right of associational privacy"). This privacy interest recognized in *Buckley* was in privacy per se and should not be confused with the exemption for groups subject to intimidation, *see infra*.[28]

In *McIntyre*, this Court addressed compelled public disclosure in violation of First Amendment privacy. Mrs. McIntyre was not compelled to publicly disclose her *belief* that a referendum should be defeated (a belief she voluntarily disclosed by distributing handbills), but she objected to public disclosure of her *identity* on her handbills if she did so. *McIntyre*, 514 U.S. at 337-38. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process "may be motivated

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Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (schoolchildren flag salute).

[28] In 1964, a famous book warned against assault on privacy by government, business, and education. *See* Vance Packard, *The Naked Society* (1964).

by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. So maintaining privacy or anonymity, in and of itself, was a cognizable interest in *McIntyre*.

In *Buckley-II*, paid petition circulators (who were compelled to solicit petition signers to qualify a ballot initiative) were compelled to publicly disclose their *identity*, their *association* with others to advance a cause, and their *belief* that a measure should be on the ballot. 525 U.S. at 186. The present case is more like *Buckley-II* because Petitioners here also claim their First Amendment privacy right against compelled speech by the forced public disclosure of their *identity*, their *association* with petition circulators and signers, and their *belief* that R-71 should be placed on the ballot. Moreover, they claim their secret-ballot privacy interest against revealing their belief in the form of publicly revealing how they would *vote*, based on the "[h]ighlights" language on the petition forms. *See supra* at 21-22.

Regarding *intimidation*, *McIntyre* recognized that one of the reasons one might wish privacy is "economic or official retaliation" or "concern about social ostracism." 514 U.S. at 341-42.[29] In addition to this recognition of an interest against intimidation at the personal level, *Buckley* provided a for a "blanket exemption," 424 U.S. at 72—herein the "intimidation exemp-

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[29] *Burson* also recognized the twin threats to elections posed by "intimidation and election fraud," 504 U.S. at 206, and applied strict scrutiny in upholding a content-based law prohibiting political speech near entrances to polling places because of the strong secret-ballot privacy interest, *id.* at 211.

tion"—for groups able to "show . . . a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," *id.* at 74. This intimidation exemption is in addition to, and distinct from, the privacy protection that *Buckley* separately recognized. *See id.* at 66.

C. Privacy and Intimidation Must Not Be Conflated, And the Intimidation Exemption Standing Alone Is Inadequate Protection.

Though privacy and intimidation are often discussed together in compelled speech cases, they must not be conflated, especially because the as-applied intimidation exemption provides inadequate protection standing alone.

First Amendment problems of compelled speech, privacy, and intimidation often occur together. In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court recognized the right to associate and promote beliefs without intimidation resulting from "compelled disclosure" because "[t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 462-63. *NAACP* imposed "the closest scrutiny," which necessarily means strict scrutiny, to the compelled disclosure in order to prevent intimidation by protecting privacy. *Id.* at 461.

Buckley relied on *NAACP* for two needed protections related to disclosure. First, it recognized a general *privacy* interest protecting *all* because "compelled disclosure, *in itself*, can seriously infringe on *privacy* of association and belief." 424 U.S. at 64 (emphasis added). This privacy interest was expressly protected by the same strict scrutiny applied in

NAACP to the "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes," *id.*: "Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny," *id.* (citation omitted). "The *strict test established by NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id.* at 66 (emphasis added).[30] In addition to (or as part of)—but not as a *substitute* for—this "exacting scrutiny," this Court "*also*" required a strong nexus (described as a "'relevant correlation' or 'substantial relation'") "between the governmental interest and the information required to be disclosed." *Id.* (emphasis added). The nexus requirement was not a description of "exacting scrutiny," though strict scrutiny's narrow tailoring mandate requires a strong nexus.[31] Nor was *Buckley*'s statement that there were "sufficiently important" interests, *id.* at 66, to meet exacting scrutiny a substitute for the "closest scrutiny" that *NAACP* mandated and the "strict test" equivalent

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[30] "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure," *id.* at 65, which principle applies to the present case.

[31] The requisite nexus was absent in *NAACP* where this Court said that disclosure of members' names had no "substantial bearing" on whether the NAACP was conducting intrastate business and so was subject to a foreign corporate registration statute. 357 U.S at 464. Under this nexus requirement, *Buckley* held that only communications "unambiguously related to the campaign of a particular federal candidate," were subject to disclosure. 424 U.S. at 80.

that *Buckley* adopted. *Sufficiently* is a term prescribing no *level* of required adequacy (as *compelling*, *strict*, and *exacting* do), but rather states whether a required level *has been met*. *Sufficiently* stated no standard, only its satisfaction. Thus, strict scrutiny should be applied in all compelled speech cases—especially those involving core political speech—to protect against the inherent risk of the loss of privacy (which *also* carries with it an inherent risk of intimidation, but protecting privacy alone is sufficient reason for the protection, there being no need to prove intimidation).

Second, *Buckley* recognized an interest against *intimidation*, in the form of an as-applied intimidation exemption for groups. The exemption was from disclosure laws that had already met the strict scrutiny requirement that protected privacy (and would consequently protect individuals from potential intimidation). The exemption applied to groups "show[ing] . . . a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals from . . . officials or private parties," 424 U.S. 74. Qualifying required only "reasonable probability," without a "heavy burden" of proof, and with "sufficient flexibility in the proof of injury . . . ." *Id.*

> The proof may include . . . specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations

holding similar views.

Id.

These two *Buckley* protections should not be conflated. Strict scrutiny is necessary to protect the First Amendment privacy right, and the intimidation exemption is necessary to protect the First Amendment anti-intimidation right. Though both strict scrutiny and the exemption provide some protection against both intimidation and privacy violation. If "exacting scrutiny" is watered down so that the government is rubber-stamped in compelling speech, and if the courts rely on the intimidation exemption as the sole protection for citizens, then *Buckley*'s protections have been abandoned and citizens are put at risk. This is doubly so if *Buckley*'s reasonable-probability test is ignored and the standard for obtaining the intimidation exemption is raised so that it becomes difficult to obtain. As shall be shown, these problems are occurring. Citizens' speech, association, belief, and participation in self-government are chilled as a result.

1. If "Exacting Scrutiny" Is Weakened, So Is Privacy Protection.

Buckley provided strong protection for privacy rights by a strong strict-scrutiny test. *McIntyre* affirmed that "exacting scrutiny" meant the "strict scrutiny" applied in *Meyer*, 486 U.S. 414, and *Burson*, 504 U.S. 191. *See McIntyre*, 514 U.S. at 346 & n.10. This provides strong privacy protection. But some subsequent cases could erroneously be read to have weakened exacting scrutiny.

McConnell v. FEC, 540 U.S. 93 (2003), spoke of "a sufficient relationship to . . . [an] important governmental interest." *Id.* at 231.

Davis v. FEC, 128 S. Ct. 2759 (2008), reaffirmed *Buckley*'s recognition of per se infringement of privacy rights by compelled disclosure, required that the infringement be "closely scrutinized," and recognized that *Buckley* required both exacting scrutiny "*and*" a close nexus between interest and information, *id.* at 2774-75. *Davis* said that exacting scrutiny requires that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," *id.* (*citing Buckley*, 424 U.S. at 68, 71). Of course, there is a serious burden where the sort of compelled disclosure at issue there and here is involved.

Citizens United said that "'exacting scrutiny' . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, at 51 (citations omitted).

If the high exacting scrutiny of *Buckley* and *McIntyre* is viewed by lower courts as having been diluted, then the privacy interest loses protection. This Court should reaffirm the high protection required to protect privacy rights against compelled speech.

If there is reduced protection for the privacy interest resulting from the weakening of exacting scrutiny, increased reliance is placed on the intimidation exemption to provide protection for both the privacy and intimidation interests. But high exacting scrutiny was the primary protection established to protect privacy rights, not the intimidation exemption. As shown next, the intimidation exemption protection has been watered down by lower courts and is inadequate. So for the vast majority of citizens chilled from participating in self-government by concerns about privacy and intimidation, the intimidation exemption is not avail-

able and so they have no real protection for privacy or against intimidation.

2. If the "Reasonable Probability" Test Is Made More Difficult, Intimidation Protection Is Reduced.

The intimidation exemption is no longer as protective as *Buckley* created it to be and cannot bear the burden of protecting against intimidation, let alone guarding privacy (which was to be the role of high exacting scrutiny), unless its high protection is reestablished. While this Court believed that courts would be sensitive in protecting against intimidation, *id.*, it is difficult to obtain an intimidation exemption. For example, though this Court said the evidence of intimidation directed at California's Proposition 8 supporters was "cause for concern," *Citizens United*, at 54, a court denied a preliminary injunction recognizing an exemption despite substantial intimidation evidence, *see* ProtectMarriage.com, 599 F. Supp. 2d at 1226.

The district court in that case imposed new tests, based on facts present in *Buckley* but not incorporated into the reasonable-probability test. It held that "minor status is a necessary element of a successful as-applied claim" and declared Proposition 8 backers neither a minority, nor a "'fringe organization,'" nor likely to be impoverished by intimidated donors. *Id.* at 1215. But none of that is in the reasonable-probability test, which was expressly stated in response to similar arguments and objections that *Buckley* listed and rejected. *See Buckley*, 424 U.S. at 68-74. While *Buckley* dealt with an exemption sought for minor parties, this Court noted minor party status could ebb and flow and did not correlate with the "critical factor," which was "the

possibility that disclosure will impinge upon protected associational activity." *Id.* at 72-73 (emphasis added). So *Buckley* expressly rejected the notion of an exemption just for minor parties.

The district court also relied on a "lack of evidence that [Proposition 8 supporters] ha[d] suffered animosity rising to the level hypothesized in *Buckley* and existing in *Brown*." *ProtectMarriage.com*, 599 F. Supp. 2d at 1216. Again, *Buckley*'s test was that there be a reasonable probability of intimidation, not that the intimidation be like that suffered by some historic group.

And the district court insisted that, if the intimidation took the form of a boycott, such activity could not be considered intimidation because it was legal, *id.* at 1218-19, ignoring the fact that this Court held that the problem in such cases is the government's *facilitation* of intimidation by compelling disclosure. *See NAACP*, 357 U.S. at 463 ("It is not a sufficient answer . . . that . . . repressive effect . . . follows . . . from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the . . . production order that private actions takes hold."). If boycotts are organized in response to information *voluntarily* disclosed, the government facilitation of the intimidation is absent. The privacy interest is precisely about who controls the release of information.

While further analysis of this denial of the intimidation exemption cannot be done here (and Petitioners' Count II is not at issue), the preceding demonstrates that the intimidation exemption as interpreted in a similar case provides little protection.

Another problem in obtaining an intimidation exemption is establishing the level of generality at which one must prove intimidation efforts. For example, the government in a case such as this will push for requiring proof of harassment at the very specific level of retaliation resulting specifically from petition signing. This is inconsistent with *Buckley*'s broader scope for proof, *see* 424 U.S. at 74, which allowed even evidence of intimidation of similar groups. Thus, in a case like this, the proper level of generality required would be proof of intimidation against supporters of traditional marriage. Moreover, evidence of intimidation efforts where petition signatures are sought is evidence that the potential for intimidation is inherent whenever petition signers are disclosed (either actual danger or the prospect that potential signers would reasonably expect intimidation efforts and be chilled). *See supra* at 8 n.17. The problems discussed above show that the intimidation exemption, as it has developed, is an ineffective remedy.

Moreover, having to obtain as-applied court recognition of protected status under the intimidation exemption imposes the sort of problems for free expression and association rejected in *WRTL-II*, 551 U.S. at 469 and *Citizens United*, at 19. The present case is an as-applied challenge, but it is a challenge to public disclosure as applied to release of all petition sheets in referenda and ballot initiatives, not a challenge based on the peculiarities or special circumstances of any group or individuals. It is not the sort of as-applied challenge that a group would bring, based on its particular experience, to obtain an intimidation exemption under *Buckley*'s reasonable-probability test, *see Buckley*, 424 U.S. at 72-74.

So in this respect it partakes of the same problems that *Citizens United* identified as requiring a facial remedy instead of a series of as-applied cases. *See Citizens United*, at 19. Obtaining an exemption involves the expense, burden, and delay of litigation, including the need to comply with or resist (sometimes with little or no success) discovery into information an intimidated group seeks to keep private. *See WRTL-II*, 551 U.S. at 469; *see also ProtectMarriage.com*, 599 F. Supp. 2d 1197 (preliminary injunction denied Jan. 30, 2009; trial scheduled for Mar. 14, 2011). Having to obtain an exemption acts like a prior restraint, *cf. Citizens United*, at 18. The exemption is a post hoc remedy that is too little, too late, for most organizations. The requirement of proof that an issue has resulted in intimidation requires a group speaking on an issue that has not previously generated threats and intimidation to first endure "death threats, ruined careers, damaged or defaced property, [and] preemptive and threatening warning letters" before seeking an exemption. *Citizens United*, at 6 (Thomas, J., concurring in part and dissenting in part).[32] The difficulty in getting an exemption leaves opposition groups free to engage in intimidation as a campaign strategy, which undoubtedly chills core political speech. *See id.* at 4.

These problems indicate the need for this Court to clarify and reaffirm the reasonable-probability test for the intimidation exemption as it was articulated in *Buckley*—stripping away limiting glosses by lower

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[32] The criminal code, also a post hoc remedy, has proven inadequate to deter intimidation as a campaign tool. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1218 (discussing criminal activity surrounding Proposition 8 campaign).

courts. And they also indicate that the intimidation exemption is inadequate alone to protect privacy and guard against intimidation. It provides no protection for the vast majority of citizens who cannot qualify for such an as-applied group exemption.

D. Washington Imposes Three Levels of Compelled Speech That Must Each Be Justified.

While First Amendment privacy protection against compelled public disclosure of identity, association, belief, and vote does not depend on the *reason* why one asserts the protection, this Court has identified reasons for asserting the protection. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. These reasons inform the following analysis of the three levels of compelled speech here.

Viewing Washington's referendum qualification process from the perspective of compelled speech, those engaging their right to associate and speak for the purpose of putting a referendum on the ballot are faced with three levels of compelled speech.

First, Washington compelled 120,577 people[33] to speak and associate by signing petitions to qualify a referendum. There are less burdensome means for

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[33] This is the number of individuals equal to four percent of those who voted for governor in Washington's last gubernatorial election, and is the number required by the Washington Constitution for a referendum to qualify for placement on the ballot. Wash. Const. art. II, § 1(b). Petitioners submitted excess signatures to ensure sufficient signatures to qualify.

qualifying referenda, but the State's system is not challenged here. This signing of petition sheets is a private disclosure of identity, association, and belief, not a public one. Just as the Framers who published the Federalist Papers without publicly disclosing themselves had to privately associate with a printer and colleagues for the purpose of printing, binding, and distributing their pamphlets, those seeking to qualify a referendum associate privately with others. Petition signers disclose their identity to a petition circulator, who is acting as the agent of the referendum proponents. Petition signers also disclose their identity to potentially nineteen other persons signing petition sheets containing twenty names, as they associate together to get the referendum on the ballot.[34] And petition signers disclose their identity to the referendum proponents, who collect and review the petition sheets before submitting them to the Secretary. Regarding *McIntyre*'s "desire to preserve as much of one's privacy as possible," 514 U.S. at 342, this is a minimal, private disclosure necessary to advance the common cause of qualifying the referendum for the ballot. Regarding *McIntyre*'s "fear of economic or official retaliation [or] . . . concern about social ostracism," *id.* at 341, this private disclosure poses little risk because the proponents, the circulator, and the other persons signing on the same petition sheet share the common cause of getting the referendum on the ballot.[35]

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[34] *See* Brief *Amici Curiae* of Common Sense for Oregon, et al. at 23-26 (petition signing increasingly occurs without disclosure to other signers).

[35] No disclosure at this level constitutes a waiver of the privacy interest. As this Court said in addressing a privacy interest in *United States Department of Justice v. Reporters*

Second, petition signers and other members of the private association seeking to place the referendum on the ballot are compelled to speak when they submit the signatures to the Secretary for canvass and verification. This is no longer totally private speech, association, and belief, but it is "public" only in the sense that it is revealed to a public official (the Secretary) and those directly involved in the canvass and verification. It is not disclosure of identity, association, and belief to the general public. Here also there is little concern about giving up privacy or of social ostracism or retaliation because of the statutory protections, such as the fact that a government official retains the compelled information, observers of the canvass and verification may not write down any of the disclosed information, review of verification (if requested) is done confidentially by a court, and if the referendum is not qualified the petition sheets are destroyed. *See supra* at 8 n.15, 9 n.18. Compelling this minimal disclosure to the government is justified by the inter-

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Committee for Freedom of the Press, 489 U.S. 749 (1989), "privacy encompasses the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another." *Id.* at 763. Consequently, "we deal not with an interest in total nondisclosure but with an interest in selective disclosure." *Id.* at 763, n.14.

The Eighth Circuit held in *Glickman*, that under FOIA's privacy exemption petition signers "did not waive their privacy interests" when they signed forms "with space for ten signatures" because they "would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum. After all, they knew the petition forms would be collected and submitted to the USDA by the Campaign." 200 F.3d at 1188.

ests the State has in not bearing the expense of putting issues on the ballot that have little public interest and in not requiring others to participate in this election absent such support.[36]

Third, petition signers are compelled to speak to the public, disclosing their identity, association, and belief, if the petitions are released to the public. Suddenly privacy vanishes and concerns about social ostracism and retaliation rush forward. The question addressed in this case is whether the government can justify this level of compelled speech.

Important to the analysis is the distinction between private disclosure to the government and public disclosure. As the Eighth Circuit put it, "This type of privacy interest—one in which individuals seeks to keep information from the general public while simultaneously divulging it for limited purposes to others—is not unusual." *Glickman*, 200 F.3d at 1188. The distinction is illustrated in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), a case involving an FEC investigation of campaign-finance complaints against the AFL-CIO, the DNC, and others. The FEC compiled numerous internal documents detailing information about volunteers, members, employees, activities, and political strategy that it planned to make public pur-

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[36] There is no waiver of the privacy interest at this level of disclosure because, as the Eighth Circuit noted in finding nonwaiver in *Glickman*, signers "knew their signatures would be collected and submitted to" the government agency verifying them, 200 F.3d at 1188 ("individuals divulge personal information to the government for limited purpose . . . ."), but "[t]he present concern is that the petition not become available to the general public, including those opposing [the signers' position]," *id.*

suant to its rule requiring release of investigation materials in closed cases. The union and DNC "assert[ed] that releasing the names of hundreds of volunteers, members, and employees w[ould] make it more difficult for the organizations to recruit future personnel." *Id.* at 176.[37] The court's analysis emphasized the private-public distinction: "[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that '[c]ompelled *public* disclosure presents a separate first amendment issue' that requires a separate justification." *Id.* at 176 (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*)). The Court held that the public-disclosure rule violated the First Amendment. The transferrable concept is that private (to the government) disclosure sufficed for government enforcement purposes and public disclosure was unjustifiable and in violation of First Amendment speech and association rights. Petitioners assert that any interests that Washington has may be met by private disclosure to the government. *See infra.*

From the foregoing, it is clear that compelled public disclosure of the identity, association, and belief of petition signers burdens privacy interests that the First Amendment was meant to protect. *See Bellotti*, 435 U.S. at 776. It is highly-protected core political speech.

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[37] In addition to this future chill, the court noted that disclosure of strategies to opponents would "frustrate the 'organizations' ability to pursue their political goals effectively." *AFL-CIO*, 333 F.3d at 177.

II. Strict Scrutiny Is Required.

The district court correctly recognized that this is an as-applied challenge involving core political speech and the privacy interest in anonymous speech and so applied strict scrutiny. (CP-App. 38a (*citing McIntyre*, 514 U.S. at 346-47).) It was correct that strict scrutiny is required because *Buckley-II* required strict scrutiny of the petition-signing discussion and because the PRA, as applied to disclosure of referenda petitions, burdens core political speech and privacy of identity, association, and belief; is not viewpoint neutral; is content-based; and imposes heavy disclosure costs. *See infra.*

Though the Ninth Circuit recognized that "protected political speech" was burdened (CP-App. 13a), that the PRA would "deter[] some would be signers from signing petitions (CP-App. 15a), and that the PRA was "not an election regulation" (CP-App. 15a n.11), it employed intermediate scrutiny, applicable "when 'speech' and 'nonspeech' elements are combined in the same course of conduct" (CP-App. 14a (*quoting United States v. O'Brien*, 391 U.S. 367, 376 (1968) (internal quotation marks omitted)) to laws having "an incidental effect on expressive conduct" (CP-App. 15a). This was erroneous. There is no nonspeech element in the petition-signing discussion, *see Buckley-II*, 525 U.S. at 186 (collecting signatures is "core political speech"), and the Secretary's policy of applying the PRA to referendum petitions creates more than a mere incidental effect on core political speech. Only by ignoring the fact that this as-applied case is about the protected petition-signing discussion, which "involves both the expression of a desire for political change and discussion of the merits of the proposed change," *id.* at 199, could the court reach such a conclusion.

Buckley-II has already settled the level of scrutiny applicable to this petition-signing "discussion," *id.*, holding that burdens must be narrowly tailored to serve compelling government interests, *id.* at 192 n.12.

Strict scrutiny also applies because the case involves burdens on core political speech. "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786 (equating "exacting scrutiny" with "strict scrutiny")). *See also Buckley-II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or imposing substantial burdens on First Amendment rights are always subject to strict scrutiny).

Strict scrutiny applies because the case involves burdens on privacy of identity, association, and belief. *See Buckley*, 424 U.S. at 64 ("exacting scrutiny"). This "strict test established by NAACP v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," *id.* at 66. And this same scrutiny protects against intimidation that does not rise to the level of providing groups a blanket exemption. Strict scrutiny is applicable because the secret-ballot privacy interest applies since most petition signers likely signed a petition in response to the invitations in the "[h]ighlights" section of the form, so that revealing their names would reveal their votes. *See supra* at 21-22.

Strict scrutiny applies because the PRA is not viewpoint neutral as applied to the release of referendum petitions because it places heavier burdens on

those *opposing* government action than those supporting it. While both comply with campaign *finance* laws, *see* RCW §42.17.020(39), only those questioning the legislature's wisdom suffer the *additional PRA disclosure* burden. The government favors supporters. The First Amendment prohibits the government from giving "one side of a debatable public question an advantage in expressing its views to the people." *Bellotti*, 435 U.S. at 785-86.

Moreover, the PRA's apparent facial content neutrality is undermined by ninety-five exemptions from public-record disclosure, RCW §§ 42.56.230–42.56.480, and there are 222 more exemptions under other state laws and another sixteen required by federal statutes. *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meeting Laws*, Chapter 12, pp. 12-1 through 12-4 (2006). Exemptions require officials to examine record contents to determine applicability. RCW § 42.56.580. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), cautioned that a general law, coupled with exemptions, may permit the government to "select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'" *Id.* at 51 (internal citations omitted); *see also Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (plurality opinion). The numerous exemptions also undercut the "credibility of the government's rationale" for requiring disclosure in the first instance. *See Gilleo*, 512 U.S. at 52.

Strict scrutiny, or its functional equivalent in the form of high "exacting scrutiny" applies even if the level of scrutiny varies with the burden imposed. *See Davis*, 128 S. Ct. at 2774-75 ("the strength of the governmental interest must reflect the seriousness of

the actual burden on First Amendment rights."). Here, given the serious harm to free speech, association, and belief by public disclosure, scrutiny must be strict. That the disclosure burden is high has become clearer after *Buckley* said (without the benefit of research on the effect of disclosure on First Amendment rights) that "sunlight is said to be the best of disinfectants," *Buckley*, 424 U.S. at 67. Disclosure advocates seize on this language and often fail to adequately justify substantial burdens, treating "transparency" as a meaningful end in itself.[38] Time, experience, and studies have revealed the true costs inflicted by disclosure and suggest that it is time to reemphasize the importance of applying strict scrutiny to each application of a disclosure statute.

In 2007, the Institute for Justice commissioned one of the *first* studies to analyze the effects of disclosure on freedoms of speech, association, and belief. *See* Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (*available at* www.ij.org/publications/other/disclosurecosts.html) ("*Disclosure Costs*"). While the study involved campaign *finance* disclosure provisions, its findings illustrate the disconnect between public perception and actual evidence regarding disclosure.

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[38] *See, e.g.*, Dkt. 2, Ex. 4 at 2 (discussing State's commitment to "transparency"). Nick Handy, State Elections Director, stated, "an unhealthy chilling effect occurs when public debate reaches a point where the passion of some individuals drives folks to take actions that are viewed by others as threatening or intimidating." *Id.* He added, "Nobody is comfortable with releasing personal information in situations like this, but it is part of transparency in government. We hope people keep their cool." *Id.* at 2-3.

Carpenter's study is important because it probed respondents beyond their general sentiments about disclosure statutes. Carpenter reported that nearly 80% of respondents favored the disclosure of the identities of individuals contributing to a ballot measure campaign.[39] *Id.* at 7. Carpenter probed further about the specifics of disclosure statutes. When the issue was personalized, support waned significantly. *Id.* Only 40% felt that their own name and address should be included and just 24% felt that their employer's name should ever be required. *Id.* Nearly 60% would think twice before contributing if it meant their name and address would be released to the public. *Id.* Even those strongly supporting disclosure indicated that they would be less likely to contribute if their information were released. *Id.*

Among reasons for not wanting personal information released, respondents cited a desire to remain anonymous, fear of retaliation (personal and economic), and that public disclosure would take away their right to a secret ballot. *Id.* Carpenter also explained that the public does not access campaign finance information:

> The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue

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[39] Respondents were asked to state how they felt about the following statement. "The government should require the identities of those who contribute to ballot issue campaigns to be available to the public."

> foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure.

Id. at 13. *See also* Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, 578 (Spring 2009) (*available at* www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf) (exploring further how the public fails to use disclosure reports). Thus, disclosure provisions do little to address the problem of voter ignorance described in *Buckley*, 424 U.S. at 68, while imposing substantial burdens on the First Amendment rights to privacy in speech, association, and belief.

Supplementing Carpenter's studies are real-world examples of harms resulting from disclosure provisions during recent elections.[40] *See, e.g.*, Brief of *Amicus Curiae* Alliance Defense Fund in Support of Appellant at 16, *Citizens United v. FEC*, No. 08-205 (U.S. 2009) (discussing reprisals against donors supporting California's Proposition 8 in 2008); Thomas M. Messner, *The*

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[40] Evidence of social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (per curiam). Evidence ranged from numerous contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes not popular everywhere and the results of such disclosure. *Id. See also* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis, White, *and the Future of Judicial Campaign Financing*, 86 Denv. U. L. Rev. 195, 218-20 (2008) (discussing disclosure burdens).

Price of Prop 8, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (*available at* www.heritage.org/Research/Family/bg2328.cfm) (same). Petitioners here fear that similar reprisals will be directed at petition signers, especially in light of the threats and harassment already directed at individuals connected to the R-71 campaign. *See supra* at 7-12.

Technology has dramatically altered the disclosure environment considered in *Buckley*. Records available under the PRA were "public" in 1976, but access meant going to a government office during business hours. (CP-App. 61a (Initiative 276 § 28 (1972)). Searching records required manually flipping through documents stuffed in filing cabinets.[41] It was often cost-prohibitive for individuals to obtain records. *See* Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/).

Today, records are kept in computer databases. Copies cost a nominal fee, are in electronic format, and can be uploaded to the Internet in searchable databases almost instantly. *See, e.g.*, www.knowthyneighbor.org (stating Washington is "Up Next"). Once on the Internet, the information can be combined with publicly available phone numbers and maps. *See, e.g.*, www.eightmaps.com.

In today's "information age," courts cannot ignore the tremendous invasions of privacy that occur when the government compels disclosure and allows it to

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[41] For example, Protect Marriage Washington submitted over 9,000 petitions sheets containing the names and other personal information of 138,000 individuals. (CP-App. 7a.)

become part of the public record. *See Reporters Committee*, 489 U.S. at 770 ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information.") (internal citation omitted). For example, the Federal Rules of Civil Procedure now require litigants to redact certain personal identifying information because of identity-theft concerns. Fed. R. Civ. P. 5.2. The rule allows parties to move, for good cause, to redact additional information and limit or prohibit non-parties' electronic access to filed documents. *Id.*

However, the concerns here go far beyond identity theft. Employers no longer must visit government offices during business hours to learn which employees supported referenda—they can do it from their offices. So can customers, suppliers, and neighbors. Recent elections demonstrate how individuals use disclosure reports to intimidate individuals exercising First Amendment rights. As the California Voter Foundation president said, "This is not really the intention of voter disclosure laws. But that's the thing about technology. You don't really know where it is going to take you." Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009) (*available at* http://www.nytimes.com/2009/02/08/business/08stream.html.)

Because of these high burdens on the privacy interest in controlling information about one's identity, association, and belief while engaging in core political speech, "exacting scrutiny" is strict. Washington must prove that the PRA, as applied to compelled public disclosure of petition signers' identity, association, and belief, is narrowly tailored to a compelling interest. But as shall be shown, Washington's application of the PRA

to referenda petitions is also unconstitutional if Washington must only prove that releasing petitions is sufficiently related to an important interest.

III. Asserted Interests Were Neither Compelling Nor Important.

Though *Buckley* involved candidates, contributions, and expenditures, none of which apply here, it provides guidance on possible interests:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Information Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")]."

Buckley, 424 U.S. at 66-68. *Buckley*'s Information Interest is focused on "campaign money," which is not involved in petition signing, and then only in "large" amounts, *id.* And the Corruption and Enforcement interests are unique to candidate elections and cannot justify public disclosure of petition signers. *See Bellotti*, 435 U.S. at 789-90; *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031-32 (9th Cir. 2009); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003).

A. No Information Interest Is Sufficient.

The State asserts an information interest in publicizing names and contact information of petition signers. This interest is insufficient because it is neither compelling nor important.

First, the Information Interest is not absolute. It is designed to disclose who has demonstrated an interest in a referendum through substantial contributions and expenditures. *See Canyon Ferry*, 556 F.3d at 1032-33. It is not designed to advise the public who might generally favor or oppose referenda (even if merely signing a petition reliably indicated that, *see infra*). Such a broad information interest could justify requiring petition signers to disclose religious affiliation or income because such data could play a role in voters' decision-making processes, which would be extremely burdensome and chilling.

Second, the interest is compelling or important only if the information conveyed to the voters is significant. Marginal information gains cannot justify the substantial burdens imposed by compelled disclosure of the identities of 138,000 individuals.[42] This is especially important for signers indicating only that issues are too important to be left to legislatures. (CP-App. 42a.) Thus, disclosing petition signers may spread misinformation about who supports or opposes referenda. And if signers indicated how they would vote, based on the "[h]ighlights" language on the forms, then the State

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[42] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (remedy must alleviate problem in "direct and material way").

has no legitimate interest in disclosing this information that is protected by the secret-ballot privacy interest. *See supra* at 21-22.

B. No Anti-Fraud Interest Is Sufficient.

The State asserts an anti-fraud interest that must also fail. First, fraud is a lesser concern during signature gathering than while voting. *Meyer*, 486 U.S. at 427-28. This is due to the justification for petition requirements—ensuring that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot. At the petition stage, the question is merely whether the people should have the final say. Proponents failing to collect enough signatures would likely see their referendum fail at the polls. This provides little incentive for fraud during petition circulation, especially given criminal penalties. *See* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. Second, petition fraud prosecution is rare, *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (two in seven years), and was detected with traditional methods (signature comparison), public disclosure playing no part, *id.* Third, though petitions have been subject to release in recent years, the State has produced no fraudulent signature detected as a result of such public release.[43] This interest is neither compelling nor important.

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[43] Even if the State were able to produce such evidence, a single fraudulent signature detected through the public release of a referendum petition would not justify the burdens that such disclosure represents. *See Turner Broad. Sys.*, 512 U.S. at 664 (remedy must alleviate problem in "direct and *material* way") (emphasis added).

IV. Public Disclosure Is Neither Narrowly Tailored Nor Sufficiently Related.

Even if the asserted interests were sufficient, public disclosure of petition signers is neither narrowly nor sufficiently tailored, and there are less-restrictive means of advancing any interest, making compelled public disclosure of petition-signers' identity, association, and belief unconstitutional.

A. Public Disclosure Is Not Adequately Tailored to Any Information Interest.

Any information interest is more directly served through better-tailored regulations. There is already adequate public information about *proponents* and *financial* supporters. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Washington Secretary of State, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step to start referendum is registration with campaign finance commission). Washington's long history of not publicly disclosing petition signers, *see supra* at 9 n.18, reveals that this more narrowly tailored approach adequately served any information (and anti-fraud) interest.

Even as to *contributions*, states may not require disclosure of contributors of de minimis amounts to ballot measure campaigns. *Canyon Ferry*, 556 F.3d at 1034. As Judge Noonan asked in concurrence, *id.* at 1036: "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'" The interest in compelling public disclosure of *petition-signers'* identity, association, and belief is less weighty, so states cannot compel their disclosure. Here one could ask, "How do the names of petition signers affect anyone else's vote? Does any voter exclaim, 'Hank

Jones signed the petition. I must be against it!'"

Public disclosure is neither narrowly tailored nor sufficiently related to any information interest.

B. Public Disclosure Is Not Adequately Tailored to Any Anti-Fraud Interest.

Any anti-fraud interest here is met by better-tailored means. First, there is limited, private disclosure to the government for signature verification. Only the Secretary has authority to canvass and verify petition signatures. RCW § 29A.72.230. This serves the State's interest in ensuring that sufficient voters support the referendum. It also protects the integrity of the election process, along with observers who ensure proper procedures and potential subsequent judicial review. *See supra* at 9 n.18. The fact that public disclosure occurs under the PRA, not the elections code, illustrates the weakness of the asserted interest. If the goal were to allow for public assistance in the signature verification process, one would expect the elections code to mandate public disclosure and provide procedures for contesting names. And while Washington now permits release of petitions, it cites no instance where release yielded detection of a fraudulent signature. *See Washington Initiatives Now*, 213 F.3d at 1139.

Second, if Washington believes that its Secretary cannot be trusted to verify signatures, that its scheme of monitors and court review is inadequate to provide a check on the Secretary, and that citizens are needed for an independent canvass and verification, it could create a special mechanism for doing so while protecting privacy so as not to chill speech and association. It could randomly select citizen panels, along the lines of a grand jury, with members bound to secrecy in doing

an independent canvass and verification.

Third, there are criminal penalties. *See* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. The State has failed to demonstrate that penalties are inadequate to deter fraud. *See WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"); *Buckley*, 424 U.S. at 56 ("There is no indication that the substantial criminal penalties for violating [the Act] combined with the political repercussion of such violations will be insufficient to police [the Act]."). The fact that fraud prosecutions have been rare, *Washington Initiatives Now*, 213 F.3d at 1139, indicates that penalties are adequately serving any anti-fraud interest.

The State failed to prove that public disclosure of petition signers' identity, association, and beliefs is either narrowly tailored or sufficiently related to an anti-fraud interest, and it has failed to show that less-restrictive means are inadequate.[44]

In sum, the State failed to meet its burden of proving that public disclosure of petition signers passes constitutional scrutiny. Consequently, Petitioners had likely success on the merits of their claim.

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[44] California relies heavily on ballot initiatives but does not release petition-signer information, and there is no record of cognizable problems of the sort the State urges would exist absent the disputed disclosure here. *See* Cal. Elec. Code § 18650 (list of signatures may only be used to qualify initiative, referendum, or recall for the ballot); *see also Bilofsky v. Deukmejian*, 124 Cal. App. 3d 825, 830-831 (Cal. App. 1981) (recognizing privacy interest of petition signers).

V. Petitioners Properly Received a Preliminary Injunction.

Where one will likely succeed in proving that privacy of petition-signers' identity, association, and belief is constitutionally protected, then (a) there is irreparable harm if speech is compelled, (b) the government has no interest in violating constitutional rights, and (c) the public interest favors enforcing constitutional liberty.

A. Speech-Protective Standards Control.

Because this is a First Amendment preliminary-injunction case, it provides this Court the opportunity to apply its standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), to that context. Where free speech, association, and belief are involved, preliminary injunction standards must protect them. In First Amendment cases, preliminary injunction decisions often effectively decide the whole case because irretrievable speech opportunities are lost or irretrievable information is disclosed. This Court should require that *Winter*'s standards be applied protectively in such contexts. While further development of this argument is precluded by space limitations, the subject was addressed in pages 29-31 of the certiorari petition.

B. Petitioners Had Likely Success on the Merits.

As shown already, Petitioners had likely success on the merits. *See supra* Parts I-IV. The other elements should have followed.

C. Plaintiffs Had Irreparable Harm.

If the identity, association, and belief of petition signers had been publicly disclosed, their First Amendment privacy interest in controlling information about

these would have been immediately and irreparably harmed. The same is true if their voting intent was revealed. Information published cannot be corralled. The release would have been particularly egregious because such compelled disclosure was not constitutionally justified. And if Plaintiffs had not received judicial protection, they would have suffered the irreparable injury of a reasonable probability of threats, harassment, and reprisals, which would also have chilled future participation in core political activity.

"Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (*quoting Elrod*); *Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (irreparable injury presumed when Plaintiffs state colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from . . . regulation that directly limits speech, the irreparable nature of the harm may be presumed.").

All doubt as to irreparable harm has been removed by this Court's decision to stay broadcasting of the California trial on Proposition 8, in which this Court held that "it would be difficult – if not impossible – to reverse the harm from those broadcasts." *Hollingsworth*, 130 S. Ct. at 712. Citing incidents of past

harassment, witnesses stated they would not testify if the trial were broadcast. *Id.* at 713. This Court noted the particular harms created by a nationwide broadcast and stated that individuals harassed for their testimony may be less likely to participate in future proceedings. *Id.* The same concerns are present here.

D. Balancing Equities Favored Petitioners.

While this Court has not had opportunity to provide similar speech-protective preliminary-injunction standards in First Amendment cases, in the Ninth Circuit, "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants'] favor." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). This is true even where "the merits of the constitutional claim were not clearly established at this early stage in the litigation," *id.* (internal quotations and citations omitted), though they were clearly established in the present case. This speech- and association-protective standard should govern First Amendment cases.

Here, once the names of the petition signers were released to groups indicating they would place petition-signers' names on the Internet, would contact signers, and would encourage harassment of signers, the First Amendment rights of those who signed the R-71 petition would have been violated. Considering the anemic nature of the state interests asserted in this context, a balance of harms favored Petitioners.

E. An Injunction Served the Public Interest.

Another Ninth Circuit decision provides a rule that

should control all preliminary-injunction analyses: "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Sammartano*, 303 F.3d at 974 (*quoting G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest for a court to find it in the public interest to deny injunctive relief. *Id.*

Here there was no interest—strong or otherwise—to justify the challenged public disclosure of petition signers' identity and beliefs. It is in the public interest that First Amendment freedoms be preserved.

Conclusion

For the foregoing reasons, Petitioners properly received a preliminary injunction, the Ninth Circuit should not have overturned it, and the decision below should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

(24)

No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, SECRETARY OF STATE OF WASHINGTON; AND BRENDA GALARZA, IN HER OFFICIAL CAPACITY AS PUBLIC RECORDS OFFICER FOR THE SECRETARY OF STATE OF WASHINGTON, et al.,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT WASHINGTON COALITION FOR OPEN GOVERNMENT

TC 11th Circuit

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INTRODUCTION

The Washington Coalition for Open Government ("WCOG") is an independent, non-partisan, non-profit organization that is a successor to the coalition of public interest groups formed in the late 1960s to advocate for open government in the State of Washington. The statute challenged here, Washington's Public Records Act, was drafted by that coalition, which in 1972 successfully advocated for its adoption by the people of the State of Washington by initiative.

WCOG's mission statement states that the organization is "dedicated to promoting and defending the people's right to know in matters of public interest and in the conduct of the public's business. The Coalition's driving vision is to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy."

WCOG, having issued a request under the Public Records Act to the Washington's Secretary of State for access to the referendum petitions at issue here, intervened in the action below. WCOG's public records request in this case was initiated by its Chairman, Toby Nixon, a former two-term Republican state representative. Its other board members include representatives of the media, the Association of Washington Business, labor unions, the Association of Realtors and the Washington Newspaper Publishers Association, local county officials, the current Democrat majority leader of the Washington State House of

Representatives, university professors, the Washington State Auditor, private attorneys and private citizens. WCOG's advocacy for open government has included filing numerous amicus briefs before Washington state appellate courts on issues relating to open public records, open public meetings, and access to court records.

SUMMARY OF ARGUMENT

Petitioners are a political action group and two unidentified Washington citizens who exercised their right of direct popular legislation under the Washington constitution to require a referendum on an enactment of Washington's legislature. They did so by signing a petition directing Washington's Secretary of State to submit a proposed law to the people of Washington for a referendum vote to revoke a statute previously enacted by the State. This method of direct popular legislation is prescribed in Article 2, Section 1 of the Washington constitution. After the fact, they sought to shroud their exercise of this direct popular legislative power in secrecy, in contravention of Washington law providing that their legislative action is a matter of public record, asserting that the United States Constitution overrides Washington law providing for transparent, open government. However, nothing in the federal Constitution compels Washington to permit Petitioners to operate the state legislative process in secrecy. There is no right, fundamental or otherwise, to secrecy in the legislative process.

No part of the United States Constitution provides for direct popular legislation, and the drafters of the First Amendment expressly decided not to include such a right, or the protection of such a right, within the First Amendment. Further, the federal Constitution generally requires transparency in the legislative process, unless a specific need for secrecy is recognized by the legislature.

Transparency in government is a core political value in the State of Washington. So is the right of direct popular legislation. The drafters of Washington's state constitution were free to balance these values as they did; Washington's constitution and Public Records Act do not facially violate any federal constitutional principle or command.

Petitioners seek sweeping relief. They seek to have this Court declare unconstitutional, as facially in violation of the First Amendment, Washington's requirement under the State's Public Records Act that petitions directing that a ballot measure be put before the voters are public records, requiring instead that they be secreted from the public's view, contradicting Washington state law which dictates that the petitions are public records. The secrecy ban that Petitioners advocate is not based on a factual determination in this case that potential harm would result to the referendum signers. Rather, the injunction issued by the District Court was premised on a facial challenge to Washington's Public Records Act. Petitioners seek a per se ban forbidding Washington (or any other state that extends its citizens the right

of direct popular legislation) from granting public access to the names of citizens who have engaged in the process of direct popular legislation.

The concept of secret operation of the popular legislative power that Petitioners urge is not supported by the decisions of this Court finding some Constitutional protection for anonymous speech only in the context of pure advocacy and interactive political speech. No decision of this Court has established or even hinted that the legislative process in this country ought to proceed in secrecy. Petitioners' far-reaching request fails for several reasons:

First, under the Washington constitution, individual voters who sign a referendum petition thereby act as "citizen legislators." By their signatures, they do one thing only: they direct the Washington Secretary of State to put a measure on a ballot for a vote of the people. The act of signing a petition is identical to the act of a legislator, proposing legislation to the full legislature for vote. Such action is not pure advocacy or hortatory speech of the kind that this Court has held is covered by a federal Constitutional right to proceed in secrecy. Directing the Secretary of State to put a referendum on the ballot, although an act accomplished by a medium of communication, is not simply the exercise of free speech; rather it is a legislative act sanctioned by the Washington constitution under specific conditions, one of which is that the citizen must affix his or her name to a petition calling for the vote. Signing the petition is thus not merely the advocacy of a position; it is a substantial

legislative act mandating that a specific proposition be put before the citizens of Washington for a vote.

Second, no provision of the Constitution requires States to operate any part of their legislative machinery in secret. The federal Constitution does not provide for a direct popular legislative power. The framers of the First Amendment expressly debated, and rejected, a clause in the First Amendment that would protect a direct popular legislative right. Petitioners cannot, therefore, locate a right to anonymous direct popular legislative power in the First Amendment. Nor does the Constitution provide for a right to legislate in secret. The federal Constitution's default rule is for legislative activity to occur in public. This Court, and Washington's Supreme Court, have upheld laws governing lobbyists against Constitutional challenge based on an asserted right to petition anonymously.

Third, the decisions of this Court on which Petitioners rely do not establish the right Petitioners claim. The cases hold only that citizens engaging in core political speech that is interactive in nature, such as pamphleteering, have a right under the First Amendment to speak anonymously. Such speech is not implicated in this case, where Petitioners challenge Washington's Public Records Act but have not challenged the state constitutional requirement that they identify themselves as petitioners by their signatures, having instead recognized that there is a valid state interest in requiring individuals to list

their names and addresses on referendum petitions at a minimum to prevent fraud.

Fourth, transparency in government is a core political value in the state of Washington, as a corollary to the principle that the people of the state are sovereign, control government, and empower government officials. Emphasizing this principle, in 1972 the citizens of the State adopted the Public Records Act by initiative. It is conceded in this case that the Public Records Act mandates that the referendum petitions signed by Petitioners be made available for public review and inspection. Though state law includes numerous exemptions from the Public Records Act, there are no exemptions applicable to referendum petitions.

The right to operate the legislative machinery in secret that Petitioners seek to establish in this case would traduce the principles of transparency, accountability of government and public officials, and due regard for the right of a sovereign citizenry to be fully informed that underlie the Washington constitution, as adopted in 1889 and amended in 1912, and the State's Public Records Act, adopted by initiative in 1972. The Public Records Act has been an important part of Washington's political system for 38 years, and no part of it has ever been declared unconstitutional by either a state or federal court (other than the District Court in this case).

Fifth, this Court has recognized that the federal Constitution affords states considerable latitude in

managing their electoral and legislative processes. Washington was free to decide how to balance the desiderata of transparency in government and access to a power of direct popular legislation, so long as it did so without offending federal Constitutional rights that (unlike the First Amendment) may apply. The provisions of Washington's constitution governing the right of direct popular legislation, including the provisions requiring the submission of signatures to be maintained as public records, not only do not offend the First Amendment, they also do not violate any other provision of the federal Constitution. They comport with the federal Constitution, and accomplish important and legitimate public objectives.

Sixth, the harm that Petitioners seek to avoid, harassment by fellow citizens who disagree vehemently with the Petitioners' legislative goals, is neither authorized nor fostered *sub rosa* by Washington law. Petitioners make no attempt to explain why every citizen legislator who injects himself into public political fora by sponsoring new laws (or, as in this case, by sponsoring review of legislature-made laws) should be completely exempt from all public scrutiny, criticism and debate to which other public actors are typically subject in a robust democracy. Petitioners' claim is limited to the assertion of an entitlement to be free from "uncomfortable conversations" in connection with the petition they actually signed, and more broadly (citing examples from other legislative efforts in other states) to be free from vile, frightening or alarmingly confrontational speech of

third parties that may intimidate them. But the harm they allege is a consequence of the wrongful actions of third parties, most of whom (ironically) may abuse their right of anonymous speech by conduct that is expressly forbidden by the law of Washington, which neither promotes nor tolerates harassment of any kind.

Seventh, the case reaches this Court on review of the district court's judgment honoring Petitioners' facial challenge to the application of the state Public Records Act to referendum petitions. Petitioners have not shown that there is no set of circumstances in which the ordinary operation of Washington law might not offend the Constitutional protections whose existence they seek to establish. History (the power of direct popular legislation in Washington has existed substantially in its present form for nearly 100 years, and petitions invoking the power have been public records for 38 years, and there has never previously been a case comparable to that brought by Petitioners) suggests that the circumstances alleged and theories advanced by Petitioners are exceptional, and not that there is a basis for declaring Washington law facially invalid, even were this Court to consider that the federal Constitution is somehow implicated in the circumstances of the instant case.

ARGUMENT

A. The Power Of Initiative And Referendum Are Legislative Powers

1. The State Constitution Provides that the Power of Initiative and Referendum Are Legislative Powers

a. Legislative power was originally vested exclusively in the legislature.

When the Washington State Constitution was adopted in 1889, its drafters provided that legislative power would be reposed in a bicameral legislature on the federal model:

> **Legislative Powers, Where Vested.** The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the State of Washington.

WASH. CONST. art. II, § 1.

b. In 1912 the Washington constitution was amended to empower citizens to directly sponsor legislation by directing its placement on the ballot.

In 1912, the Seventh Amendment to Washington's constitution redefined the legislative power expressly to include a right in the people to legislate directly:

> **Legislative Powers, Where Vested.** The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject or propose any act, item, section or part of any bill, act or law passed by the legislature.

Article 2, Section 1 provides that the legislative power reserved to the people includes the power of initiative and referendum. The manner of compelling a vote on a proposed initiative or referendum was prescribed in the amendment. A specified number of "voters shall be required to propose any [initiative] measure by petition" and, likewise, a specified number of voters "shall be required to sign and make a valid referendum petition." The amendment provides that the petitions be submitted to the Secretary of State, who plays a purely ministerial role in validating that the requisite number of eligible voters have signed, and then putting the measure(s) on the ballot. The legislative power evidenced in the initiative and referendum process is so significant that "the veto power of the governor shall not extend to measures initiated by or referred to the people." WASH. CONST. art. II, § 1(d). In sum, citizens executing referendum petitions are taking on the mantle of citizen

legislators in sponsoring legislation to be voted on by the people of the State.

Direct popular legislation is important in the State of Washington. It is typical, in an election year, that two or three referendums or initiatives are placed before the voters for approval. Since 1972, there have been 1,114 initiative petitions filed, of which 87 were validated and put on a ballot for a vote. In that time, 58 referendum petitions were filed, and 21 went directly to the legislature under the constitutional provision authorizing referendums to go to the legislature; 8 of the remaining 37 were validated and placed on the ballot for a vote.[1] Since 1972, the petitions submitted to the State have been public records, available for public review. Petitioners have pointed to no incident of harassment or harm to any petition-signer over the four decades since the Public Records Act became law, and we are aware of none.

2. The Washington State Supreme Court and this Court Consistently Characterize the Power of Initiative and Referendum as Legislative Power

Washington's Supreme Court has recognized that the power of initiative and referendum are legislative

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[1] Washington State Secretary of State, "Elections & Voting, Index to Initiative and Referendum History and Statistics: 1914-2009," *available at* www.sos.wa.gov/elections/initiatives/statistics.aspx, last visited March 24, 2010.

powers, exercised directly by the people. *State ex rel. Mullen v. Howell*, 181 P. 920 (Wash. 1919); *Fritz v. Gorton*, 517 P.2d 911 (Wash. 1974). This Court, likewise, has described the power as legislative in nature. *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

In *State ex rel. Mullen v. Howell*, a case regarding Washington's adoption of the Eighteenth Amendment to the United States Constitution, Washington's Supreme Court determined that, "[u]nder the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of the state." 181 P. at 926. Judge Mackintosh, in his concurring opinion, was even more explicit, stating that "[b]y the adoption of the initiative and referendum amendments the people of this state became a part of the legislative branch of the state government." *Id.*, at 928.

In *Fritz v. Gorton*, various persons, including a professional lobbyist, challenged the constitutionality of Initiative 276, the statewide, citizen-sponsored initiative that became the Public Records Act. After reciting its history, *Fritz* characterized Washington's referendum process as a vehicle for "direct legislation." 517 P.2d at 916. Initiative 276 survived the thorough examination it received in *Fritz*, and has stood on solid constitutional ground since its passage in 1972.

This Court affirmed the direct legislative action embodied in the referendum: "The referendum . . . is a means for direct political participation, allowing the

people the final decision, amounting to a veto power, over enactments of representative bodies." *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 673 (1976). The Court also quoted an opinion from the Ninth Circuit that referred to the referendum process as an act of "direct legislation." *Id.*, at 678, quoting *Southern Alameda Spanish Speaking Organization v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (declaring that the referendum is "an exercise by the voters of their traditional right through direct legislation to override the view of their elected representatives as to what serves the public interest.") Here, as in *Eastlake*, *Mullen* and *Fritz*, the Petitioners have exercised the referendum process as a direct legislative action.

3. A Citizen Who Affixes Her Signature to an Initiative or Referendum Petition Engages in a Significant Legislative Act, Not Merely Speech

A petition for an initiative or referendum is not an argumentative or hortatory item. It is a specific directive to the Secretary of State, commanding the Secretary of State to put a specified measure on the ballot.

Amendment 7 to the Washington constitution authorized the state legislature to make laws effectuating the right of direct popular legislation. In 1913 the legislature provided that petitions for referenda must contain the following language above the signature lines:

> To the Honorable . . . . . , Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No . . . . . , filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . day of November, (year) and each of us for himself or herself says: I have personally signed this petition, I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

WASH. REV. CODE § 29A.72.130 (2005).[2]

The execution of a referendum petition is more than mere expressive conduct or the advocacy of a particular political viewpoint. It is an act of legislation. Persons circulating a pamphlet or signing a petition for submission to members of a representative governmental body asking that particular action be taken are expressing viewpoints on an issue. Their

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[2] Substantially identical language is required for initiative petitions, under the same code provision. WASH. REV. CODE § 29A.72.130 (2005).

action is advocacy, aimed at persuading voters or representatives to act in accordance with their views. But they have no authority to require that the action requested be taken. In contrast, persons executing a referendum petition, by virtue of the Washington State Constitution, are exercising legislative power. They are not urging others to take discretionary action on their behalf. They are directing the Secretary of State to place a measure before the voters of the State for a vote. The Secretary of State's review of the petitions is limited to a determination whether there are sufficient Washington voters listed on the petitions so that the ballot measure may go forward.

This action of referring a matter to the voters is precisely comparable to the action of state legislators to refer a particular proposed bill to the full legislature for approval. While legislators, in taking such action, might be subject to criticism from citizens who disagree with the legislators' viewpoint on a proposed bill, it has never been suggested that the First Amendment mandates that the legislators should be cloaked in anonymity in voting on whether to refer a bill to the full legislature, to avoid being criticized or intimidated.

As the Court of Appeals correctly recognized in this case, a citizen signing a referendum petition is not engaged in pure advocacy or simply expressive conduct; signing the petition is an act of legislation. It is the first and essential step in the legislative process by which measures proposed by citizen legislators are submitted to the popular vote.

Sponsors[3] of legislation are free to advocate for or against the legislation they have sponsored, but they cannot deny that in sponsoring legislation they have put their hands on the levers of state power, and have directly begun the process of making law, in a way that mere advocates of political positions (anonymous or otherwise) do not.

The Court of Appeals correctly recognized that acts accomplished by speech (or similar communication media) are different from speech that is pure speech. It is commonplace in our law, for example, that conspirators can be prosecuted for the act of conspiracy, even though that act can only be accomplished by speech. *Dennis v. United States*, 341 U.S. 494, 575-76 (1951); *Giboney v. Empire Storage & Ice*, 336 U.S. 490 (1948). The case of *United States v. O'Brien*, 391 U.S. 367 (1968), which the Court of Appeals cited for the same principle, even more emphatically supports the Court of Appeals' judgment in this case. Burning a draft card is far more clearly expressive conduct than the act of initiating legislation by signing a referendum petition, but this Court did not hesitate in that case to affirm that legislation intended to deal with the *conduct* associated with draft card burning was not prohibited by Constitutional principles that protect speech.

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[3] Certain amici have argued that persons proposing legislation for the popular vote may not actually support the measures which they are proposing for inclusion on the ballot. Even if true, unlikely as that may seem, these persons are nevertheless "sponsors" under state law. WASH. REV. CODE § 29A 72 020 (2005).

B. There Is No Right, Fundamental Or Otherwise, To Operate The State Process For Direct Popular Legislation In Secret

1. Direct Legislation Is Not Provided for or Protected in the United States Constitution

a. The Constitution provides for purely representative democracy, and contains no provision for direct legislation.

The United States Constitution originally provided for popular involvement in the federal government only through a purely indirect, representative process. The people were entitled to vote directly for representatives to the lower house of Congress. U.S. CONST. art. I, § 2. All other participation in government by the people, as the Constitution was originally drafted, was from at least one remove: representatives to the upper house of Congress, the Senate, were to be selected by state legislatures. U.S. CONST. art. I, § 3.[4] The President was, and is, selected by Electors, not by popular vote. U.S. CONST. art. II, § 1.

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[4] The Seventeenth Amendment, ratified in 1913 (in the same period of Populism during which Washington, among other states, amended their Constitutions to provide for the popular power of direct legislation), provided for the popular election of senators.

The Framers of the Constitution did not have unalloyed faith in the abilities of the common citizen: Mr. Gerry of Massachusetts, for example, argued that whereas in England the lack of a popular right to vote threatened the liberty of Englishmen, "[o]ur danger arises from the opposite extreme: hence in Mass. the worst men get into the Legislature. . . . It was necessary on the one hand that the people should appoint one branch of the Govt. in order to inspire them with the necessary confidence. But he wished the election on the other to be so modified as to secure more effectually a just preference of merit." Notes of Debates in the Federal Convention of 1787, Reported By James Madison, 73-74 (Norton Ed., 1987) (1966).

The only method prescribed in the federal Constitution to make statute law is through acts of Congress. There was and is no provision anywhere in the Constitution that endows the people with the ability to propose, or cause the enactment of any statute, at either the federal or state level of government. Though the referendum process is not unique to the State of Washington (there are 25 other states in which adoption of legislation by referendum or initiative is available) the choice whether to permit legislation by direct popular action has been left to the states. The Court has held that the question whether state constitutional provisions enabling direct popular legislation comport with the Constitution's command that states have "a republican form of government" (U.S. CONST. art. IV, § 4) are nonjusticiable political questions for Congress to resolve. *Pacific States*

Telephone & Telegraph Co. v. State of Oregon, 223 U.S. 118, 150 (1912). To our knowledge, Congress has never addressed that question.

b. The Framers expressly rejected First Amendment protection for the exercise of a direct popular legislative power.

(1) A popular right of "instruction" was considered and expressly rejected by the Framers.

When the Framers took up debate over a bill of rights in 1789, "Mr. Tucker of South Carolina then moved to insert these words, 'to instruct their representatives.'" The Complete Bill of Rights: The Drafts, Debates, Sources and Origins, 145 (Neil Cogan, Ed., Oxford University Press) (1997). It was understood that the amendment was intended to vouchsafe to the people a power to dictate to their representatives in Congress how to vote. A number of delegates spoke in opposition, arguing in the main that such a power was fundamentally inimical to the idea of representative government that underlies the Constitution, and "would destroy the very spirit of representation itself, by rendering Congress a passive machine instead of a deliberative body." *Id.*, at 159. Mr. Stone of Maryland protested that "This is a power not to be found in any part of the earth except the Swiss Cantons; there the body of the people vote upon the laws, and give instructions to their delegates. But here we have a different form of government, the people at large are

not authorised under it to vote upon the law, nor did I ever hear that any man required it. Why then are we called upon to propose amendments subversive of the principles of the constitution which were never desired." *Id.*, at 151.

The amendment proposed by Mr. Tucker was voted down "by a great majority." *Id.*, at 160.

(2) The state-created right of direct legislation is not "petitioning" as provided in the First Amendment.

From the debate on Tucker's unsuccessful amendment, it is clear that the Framers did not conceive that "petitioning" as described in the First Amendment included any power of direct legislation. Indeed, Mr. Gerry of Massachusetts differentiated the First Amendment petitioning right from Mr. Tucker's proposed popular right to "instruct" the members of Congress:

> The amendments already passed had declared that the press should be free, and that the people should have the freedom of speech and petitioning: therefore the people might speak to their representatives, might address them through the medium of the press, or by petition to the whole body. They might freely express their wills by these several modes. But if it was meant that they had any obligatory force, the principle was certainly false.

Id., at 159.

Petitioners here cannot be heard to contend that the power afforded to them under Washington's constitution to sponsor legislation directly without going through the representative process is within the scope of the First Amendment; not when the Framers themselves so clearly and directly declared that it was not.[5]

"Petitioning" then, as described (and actually protected) by the First Amendment must be understood to mean only that citizens have a right to advocate to the people generally and to address their representatives that cannot be abridged by government, and not that citizens have any right to legislate directly. Viewed in that light, the First Amendment not only does not sustain Petitioners' application to this Court to create a right to legislate in secret, it is actually at odds with it. In states like Washington that have a right of direct popular legislation, the language and purpose of the First Amendment would logically serve to protect Washingtonians' right of access to one another for purposes of persuasion, not to insulate citizen-legislators who seek to make new laws from the views and wishes of their fellow citizens.

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[5] WCOG acknowledges that Washington, having decided to extend the right of direct legislation to its people, may not violate other provisions of the federal Constitution in its administration and implementation of that right and may not limit the people's freedom to speak about the exercise of the right. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). It does not – *see* Section E-4, *infra*.

2. There Is No Federal Constitutional Right to Legislate in Secret

a. The United States Constitution affirmatively provides for transparency and accountability in the legislative process.

The federal Constitution does not provide for or protect a power of direct popular legislation. In addition, it does not provide for or protect any power to legislate in secret.[6] On the contrary, it requires public

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[6]. Petitioners argue somewhat loosely that they seek to establish a right to exercise their state constitutional right to direct popular legislation "anonymously." However, that is not quite what Petitioners are really asking for. Petitioners do not challenge the constitutionality of WASH. REV. CODE § 29A.72.130, 150 (2005), which require that direct popular legislation can be accomplished only by the submission of signed petitions, that only eligible voters may sign the referendum petitions, and that the signatures on the petitions must be validated by the Secretary of State. Petitioners appear to concede that, as this Court has recognized, "there must be a substantial regulation of elections if we are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974), and that the Secretary of State must be able to validate that signers of initiative and referendum petitions are eligible voters ("chaos" would certainly result if any person – citizens of other states or even Canada, which borders Washington State – could sign a referendum petition). In those circumstances, Petitioners aren't seeking "anonymity" at all, in the sense of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where petitioner resisted disclosure *to the government* of her identity as a pamphleteer. Rather (in an unusual twist in First Amendment cases, which generally involve an assertion of liberty from restraint by formal government agencies) Petitioners are

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proceedings. The general rule is that the public's business be conducted in a public manner, except when the national interest demands secrecy. "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . " Significantly, a minority of either House may *require* that "the Yeas and Nays of the Members . . . be entered on the Journal." In other words, there is little likelihood that the identities of the voters on bills will be withheld from the public. U.S. CONST. art. I, § 5. This Court has interpreted that clause to mean that the Framers intended the public business to be conducted in public, as a means of ensuring the accountability of legislators to the public. *Field v. Clark*, 143 U.S. 649, 670 (1892).

b. The United States Constitution did not require secrecy in voting.

(1) Like the power of direct legislation, the secret ballot is a creation of state law.

Contrary to the arguments of Petitioners and amici, who discover in the federal Constitution a supervening "fundamental right" of anonymity in the legislative process, the federal Constitution does not provide for any secrecy even in the electoral process.

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seeking to make laws in *secret*, divulging their identities to government officials, but hiding them from their fellow citizens.

Though the "Australian" system of secret ballots is by now well-ensconced in American political life, secret ballots were not required by the Constitution. At the time of the American Revolution "many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Burson v. Freeman*, 504 U.S. 191, 200 (1992). Secret ballots did not come into use until the states severally decided to use them (at different times), in the exercise of their "broad power" to manage their electoral processes. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). But the Constitution does not command secrecy at the polling place, and this Court has never declared such a requirement to be implicit in any provision of the Constitution. The Court has recognized Congress' power to protect the franchise by adopting measures to reduce the possibility of intimidation, but did not say Congress was Constitutionally compelled to adopt them. *The Ku-Klux Cases*, 110 U.S. 651 (1884).

(2) Washington's constitution does provide for a secret ballot, but not for secret initiation of direct popular legislation.

The drafters of Washington's constitution included an express provision for a secret ballot. Article VI, § 6 of Washington's constitution provides:

> All elections shall be by ballot. The legislature shall provide for a method of voting as will ensure to every elector absolute secrecy in preparing and depositing his ballot.

The people of Washington – and their leadership who drafted their constitution – plainly understood how to provide for secrecy when, in their judgment, it was important to the democratic process to provide for it. They pointedly did *not* provide for secrecy in the popular direct legislative process; on the contrary the 1912 amendments to Article 2, Section 1 expressly required sponsors of direct legislation to do so by signing petitions to be filed with the Secretary of State. It is true that the Attorney General of Washington opined much later that such petitions were not public records, but that position was overturned by the act of the people in adopting the Public Records Act.[7] Initiative and referendum petitions have been public records since 1972. Thus, amici's argument that a right to legislate in secret should be implied from Washington's constitution is incorrect.

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[7] Both in this Court and below, Petitioners have misunderstood the operation of the Public Records Act. The Act does not specifically detail what records are and are not public. Instead, it ordains that *all* records in government hands are public, unless specifically exempted from disclosure by law. WASH. REV. CODE § 42.56.070(1) (2006). There is no exemption in Washington law for initiative and referendum petitions.

c. The Court has held the Federal Constitutional right to petition the Congress is properly subject to transparency rules.

Not only does the Constitution generally require transparency in the legislative process, this Court has upheld laws adopted by Congress to enhance that transparency against challenges that requiring lobbyists to make disclosures would violate their rights to petition under the First Amendment.

In *United States v. Harriss*, 347 U.S. 612 (1954), the respondents had been convicted of failing to register and make required disclosures as lobbyists, under the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. They challenged the statute, claiming that it infringed their rights of speech and to petition under the First Amendment. The Court rejected that contention.

The Court observed that the statute might be a deterrent to citizens unwilling to comply, but said this incidental effect did not demand a different outcome. The Court noted that the claims, as in this case were largely hypothetical,[8] but said "even assuming some such deterrent effect, the restraint is at most an

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[8] The fact is that Petitioners in this case were *not* deterred from signing their referendum petition, even though at the time they signed their petition such petitions were known to be public records under the Public Records Act.

indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from the criminal libel laws. The hazard of such a restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power . . . " *Id.*, at 626.

The Washington State Supreme Court relied on *Harriss* in its review of Washington's more stringent disclosure requirements for lobbyists, which were adopted as part of the same initiative in which the people of Washington adopted the Public Records Act. Citing *Harriss*, the Court held that the right to petition was not offended by disclosure requirements. *Fritz, supra.*[9]

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[9] The Washington Court doubted that the right to petition was a right to petition *secretly*:

> Since its ancestral beginnings as an obscure provision in the Magna Carta, the right to petition has been commonly understood to be a procedure of an open and public nature. The history of England includes picturesque exercises of this right including a Chartist petition in 1842 six miles in length which had to be broken into bundles before it could be presented to the House of Commons. The right to petition was incorporated into many of the legislative pronouncements of the rebelling colonies and in the Declaration of Independence. In the 1830's, the Congress was deluged with petitions calling for the abolition of slavery. In response, the House adopted a standing rule that all petitions of this nature would be tabled without public notice, or action of any kind John Quincy Adams vehemently fought and won repeal of the rule maintaining that not even 'the most

(Continued on following page)

C. Petitioners Identify No Case Law Establishing A Right To Secretly Sponsor Legislation

The three primary cases relied on by Petitioners, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Meyer v. Grant*, 46 U.S. 414 (1988), do not establish a right to engage the legislative process in secret. These cases all involve interactive speech activity surrounding the election process at the state level but none involves the actual act of legislating as invoked by Petitioners herein.

1. *Buckley v. American Constitutional Law Foundation, Inc.* Is Inapplicable Here

In *Buckley*, the court struck down Colorado statutes that required that initiative petition circulators be registered Colorado voters and wear

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abject despotism' would 'deprive the citizen of the right to supplicate for a boon, or to pray for mercy.' Other notable examples of open and well publicized petitioning in the history of the United States include: the deployment of unemployed armies of petitioners by General Coxey of Ohio in 1894, the march for bonuses by veterans in 1932, and the dramatic marches of the poor led by Dr. King and Reverend Abernathy in the past decade. We note these examples to emphasize the intrinsically non-secretive and public nature of the historic development of the right to petition. *Fritz*, 517 P.2d at 929.

identification badges, and that reports be made to the state containing names, addresses and amounts distributed to all paid circulators. The Court was concerned that such state requirements unconstitutionally infringed upon "interactive communication concerning political change." *Buckley*, 525 U.S. at 186, quoting *Meyer*, 486 U.S. at 422. The Court also determined that the Colorado laws "significantly inhibit[ed] communication with voters about proposed political change." *Id.*, at 192.

Unlike the offensive provisions in *Buckley*, Washington's Public Records Act in no way trenches upon the interactive, one-on-one communications that a petition-gatherer seeks. There is no limiting of the political message, no threat that the freedom to engage in political discourse and "the expression of a desire for political change" will be foreclosed. *Id.*, at 199. And, unlike the badge identification requirement declared unconstitutional in *Buckley*, any disclosure of the Washington petition-signers' identities after the petitions have been submitted to the Secretary of State does not compel disclosure of those persons' identities "at the time they deliver their political message." *Id.*, at 209. That is, the interactive communication can still take place, and the petitions may still be referred to the ballot, without the petition-signers' facing harassment or repercussions at the time they are engaged in speech. *Buckley* does not create a constitutionally protected right to direct legislation, anonymous or otherwise.

2. *McIntyre v. Ohio* Is Inapplicable Here

a. *McIntyre* applies solely to the right of pure advocacy and not to the legislative process.

In *McIntyre*, the court declared that an Ohio statute requiring the name of a person authoring an election pamphlet violated the First Amendment. As the Court made clear, the question in *McIntyre* concerned the "distribution of anonymous campaign literature." *McIntyre*, 514 U.S. at 336. *McIntyre* involved a single person who created and distributed handbills in opposition to a proposed school tax levy in front of an Ohio middle school. Ms. McIntyre was not proposing legislation for a vote of the people of Ohio; rather, she was simply expressing her opinion as to the proposed referendum. Ms. McIntyre was engaged in pure advocacy, as opposed to sponsorship of legislation.

b. The Court has often recognized distinction between pure speech and action accomplished by speech.

This Court has previously recognized a distinction between pure speech and action accomplished by speech. *See O'Brien*, *supra* (recognizing the existence of "speech" and "non speech" elements in the act of burning a Vietnam War draft card); *Dennis*, *supra* (Communist conspiracy not protected by free speech allegations); *Giboney*, *supra* (restraint on labor union picketing activities did not violate picketers' First Amendment rights). In *Dennis*, the Defendants were

charged with conspiring to form the Communist Party of the United States to advocate for the overthrow of the United States Government by means of force and violence. *Dennis*, *supra*, at 497. The *Dennis* Court recognized that freedom of speech was often raised in conspiracy cases, because "communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved." (Jackson, J., concurring, *id.*, at 575). However, as stated in *Giboney*, and quoted by *Dennis*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney*, *supra*, at 502.

Here, the petition-signers' act of signing a petition to be presented to the Secretary of State and placed on the Washington ballot is clearly distinguishable from the leafleting and handbilling undertaken by Ms. McIntryre in Ohio. The Ninth Circuit correctly differentiated the initiation of legislation from pure advocacy. *Doe v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009) ("The district court's analysis was based on the faulty premise that the [Public Records Act] regulates anonymous political speech.") Although the Ninth Circuit accepted for purposes of its review that the signing of the petition was "speech," it clearly differentiated the speech involved in petition-signing from that of leafleting, handbilling or actual petition-gathering, all forms of pure political speech subject to review under strict scrutiny. There is no

constitutional protection for direct legislative action as undertaken by the petition-signers herein.

3. *Meyer v. Grant* Is Inapplicable Here

a. The Court carefully circumscribed Meyer's application to circulation and solicitation of petitions.

Meyer is a free speech case which addressed specifically the circulation of petitions, the solicitation of signatures, and a Colorado statute that made it a felony to pay petition circulators. The Court found the law unconstitutional because petition circulation "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22 (internal citation omitted). No such core political speech is implicated in this case. The Court's holding was carefully circumscribed throughout the opinion to apply only to "circulation" of petitions or "solicitation" of signatures. Nowhere did the Court go so far as to rule that the act of signing constituted the kind of speech that the Constitution requires to be anonymous (obviously, in signing her name in compliance with state law, a citizen necessarily yields her anonymity).

b. Washington has not limited Petitioners' rights to core political speech.

Unlike in *Meyer*, there is no allegation and no proof that Washington has limited the Petitioners' right to circulate and solicit signatures. There is no

allegation and no proof that Washington has limited the Petitioners' right to speak anonymously in favor or opposition to any proposition. Washington has no law constraining Petitioners' access to their elected representatives (either anonymously or otherwise). There is in fact no allegation or proof of any limitation on core political speech; that is, the interactive, one-on-one communications referenced by this Court in *Meyer* (*id.*, at 424) and *Buckley* (O'Connor, J., concurring, 525 U.S. at 215). *Meyer's* rationale is inapplicable to the Petitioners' claim because no one has limited or obstructed Petitioners' rights to circulate, solicit and advocate for signatures and passage of a particular referendum. These values of core political speech and advocacy have been respected. Washington's constitution does require that a person wishing directly to operate the levers of government must identify himself; Washington's Public Records Act provides that the identity of petitioners is a public record.

4. The Petitioners' Legislative Actions Differentiate Their Situation from the Issues Facing the Court in *Buckley*, *McIntyre* and *Meyer*

None of the Petitioners' three principal cases holds that the act of executing a referendum petition, pursuant to which a citizen is exercising legislative powers, is an interactive communication subject to review under a strict scrutiny standard. In fact, the Court carefully circumscribed its holding, in *Meyer* in particular, to address only the "circulation" of election

materials. While signing a referendum petition is definitely a communication related to the legislative process, its *purpose* is not pure advocacy, it is to require the Secretary of State to take an essential step toward making law.

Once a referendum measure is validated by the Washington Secretary of State, who determines whether an appropriate number of voters have signed referendum petitions, the matter is submitted to the people of the State of Washington for a vote. The vote by the people certainly constitutes an election subject to the secret ballot requirement of the state constitution. But signing a petition directing that a matter be placed on the ballot is not an election.

In the case at bar, there is no challenge to the State requirement that a petition must be signed in order that the State can determine whether the proper number of eligible voters in the State have exercised legislative power to demand a particular measure be submitted to voters for approval. It is understood that the execution of the petition occurs after the interactive communication has taken place. In other words, the petition gatherers have been able to approach individuals and request that they sign the particular referendum petition in question. In contrast, the act of signing the petition is a directive to the State by the citizen legislators executing the petition that a measure be placed before the voters for approval. The execution of a petition does not seek a response from any other person to that act other than the State's validation of the signature.

None of the interactive communication that was the subject of *Buckley*, *McIntyre* or *Meyer* is at issue in the case at bar. This case does not involve limitations on the solicitation of signatures. Nor does it involve any reporting requirements as to petition circulators, nor requiring them to wear badges. This case does not involve restrictions on the ability of petition circulators to circulate pamphlets that have been drafted by anonymous authors. While circulating petitions and pamphlets, and solicitation of signatures is advocacy, the acts of signing and filing the petition are legislative acts. The distinction matters.[10]

D. Transparency, Like Direct Legislative Power, Is A Core Political Value In Washington

1. Washington's Constitution, Like the Federal Constitution, Requires Open Government

Article 2, Section 11 of the Washington constitution mimics the requirement of the federal Constitution

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[10] This is not a case of pure speech. But even if it were the kind of pure speech as to which the Court has said the Constitution provides a right to speak anonymously, as in cases like *McIntyre*, the Court has still never said that the right of anonymous speech is required in every context The Court has not held, in other words, that in all cases where any person advocates any position on a political or governmental issue, that person must be accorded anonymity. If it were otherwise, it is hard to understand how every individual who came before a city council to testify on a controversial issue might not wear a hood, and why every mayor and congressman might not be privileged to act behind closed curtains, fully in keeping with our Constitution

that the acts of the legislature be done in public and recorded in public journals. The constitution requires, quaintly perhaps (but in service of a clear desire by the people of Washington to have access to the goings-on of their legislature) that the "doors of each house shall be kept open" when the legislature is in session, subject to a power in the legislature to debate in secret where the public welfare requires it. WASH. CONST. art. II, § 11. Even after a secret debate, however, there must be a public rendition of the voting record:

> No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same shall be entered on the journal of each house . . .

WASH. CONST. art. II, § 22.

2. Numerous Washington Statutes Adopted by Direct Legislation Underscore Importance Washingtonians Put on Transparency in Government

a. The Public Records Act was adopted by initiative in 1972.

One of the most significant exercises of citizen legislative power in Washington's history occurred in 1972 when a coalition of citizens groups placed before the voters of the State Initiative 276, which provided for public disclosure requirements as to campaign financing and lobbying, and which also mandated

that public records in Washington be open for public review. The initiative was passed in response to the public's concern as to lack of governmental accountability and what was perceived as misuse of government power during the civil rights and Vietnam War era.

The preamble to the Act sets forth deeply held principles of democratic government thoroughly in keeping with the spirit that animated the Founders in the first place:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and the exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

WASH. REV. CODE § 42.56.030 (2006).

In its 38 years of existence, the Act has never been amended to exempt from public disclosure referendum and initiative petitions, and it is conceded in this case that the Public Records Act mandates disclosure of the petitions. No portion of the Public Records Act has ever been declared unconstitutional under either the federal or state Constitutions, with

the exception of the District Court ruling in this matter.

b. The Washington Public Disclosure Act was adopted by the same initiative in 1972.

In the same initiative in which they adopted the Public Records Act, Washingtonians adopted broad disclosure requirements for lobbyists. The state Supreme Court upheld these requirements against Constitutional challenge in *Fritz v. Gorton*, *supra*. In that statute, it was

> declared by the sovereign people to be the public policy of the State of Washington . . . that full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

WASH. REV. CODE § 42.17.010(11) (2006).

c. Open Public Meetings Act – adopted by Washington's legislature in 1972.

In the same era, animated by the same sense of need to increase the transparency of governmental operations and thus to enhance citizen oversight, the state legislature enacted the Open Public Meetings Act, WASH. REV. CODE Ch. 42.30, *et seq*. In it, the legislature declared that:

> All public commissions, boards, councils, committees, subcommittees, departments,

> divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. WASH. REV. CODE § 42.30.010 (2006).

Under the Act, decisions by state and local agencies and boards are required to be taken in open meetings. Actions taken behind closed doors are "null and void," WASH. REV. CODE § 42.30.060(1) (2006), and have no force or effect, except in narrowly prescribed circumstances allowing for discussion in executive sessions. WASH. REV. CODE § 42.30.110 (2006).

E. The Drafters Of Washington's Constitution Were Free To Balance The Unique State Interest In Transparency And The State-Created Right Of Direct Popular Legislation As They Did

1. The Constitution Affords States Entitlement to Govern Their Own Electoral Processes

This Court has recognized that each individual state "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco City Democratic Central Committee*, 489 U.S. 214, 231 (1989). This court in *Burson v. Freeman*, 504 U.S. 191 (1992), outlined the evolution of the election process throughout the states and emphasized that the individual states have each been

allowed to develop their own process – including implementation of the secret ballot – some states acting more quickly on voter fraud and intimidation issues than others. Federal intervention in this evolution has been rare.

2. States Have the Right to Balance Competing Interests So Long as They Do Not Violate an Express Constitutional Command

Burson, involved a statute that created a zone around the polling place within which advocates could not confront and seek to persuade voters. The clear effect of the statute was to limit free speech of the most basic kind – speech designed to persuade fellow citizens on matters of political import – but the state defended it on the ground that the limitation on free speech was justified by the reduction of possible intimidation or improper influence on voters. Significantly, the *Burson* Court did *not* declare that the Constitution contained any requirement that voters be absolutely free of influence. Nor did the Court say that the Constitution required that the state balance the two desiderata – free speech and intimidation-free voting – in any particular way. The Court did hold that the state was free to limit free speech rights in pursuit of a desirable reduction of the possibility of improper interference with voter choice and discretion, and the Court approved the state's choice without drawing a specific line as to how the balance

should be achieved.[11] In this case, likewise, the people of Washington were free to decide for themselves how to balance the goals of transparency in government and of liberal access by citizens to the power of direct popular legislation. They have done so in a way that does not violate any affirmative Constitutional limit; as in *Burson*, their choice should be respected.

3. Washington Respects the Right to Speak Anonymously, and Its Constitution Establishes a Right to Vote in Secret, but It Requires the Legislative Process to be a Matter of Record

The federal Constitution protects the right of citizens of all states to engage in core political speech anonymously, if they wish to do so. *See McIntyre*, *supra*. Washington has no laws that trench upon that Constitutional privilege, and Washington has taken no step that interferes with any anonymous advocacy the Petitioners here may wish to undertake in pursuit of their legislative goals. And, as we have shown, Washington's constitution affords all voters a right to exercise their franchise in "absolute secrecy." Petitioners do not complain that their right to a secret ballot was in any way affected in this case. However, Washington law is specific; if citizens wish to do

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[11] In an analogous decision, the Court affirmed Congressional power to balance free speech rights against proper and efficient operation of the federal government, noting that exact choices how to do so were for Congress to make. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947).

more than advocate and vote, if they wish to move the levers of state power by actually sponsoring legislation, they must identify themselves. We show below that several healthy policies are served by that choice, though it is WCOG's respectful submission that the people's desire for transparency is a reason sufficient unto itself that need not be supported by further justifications. Petitioners have not explained why citizen legislators should be permitted a privilege of secrecy not afforded to other political and governmental actors who similarly exercise constitutional power to affect the laws governing the people, like candidates for office, officers of executive agencies, judges, legislators, and so on.

4. Petitioners Do Not Contend that Any Other Potentially Applicable Provisions of the Federal Constitution Are Violated

It is well-established that even though Washington is not required to extend its citizens the power of direct popular legislation, once it has done so it cannot administer that power in a way that offends the federal Constitution. The power of initiative and referendum is not, as we have shown, within the First Amendment. Petitioners have not argued that Washington's constitutional provisions for the exercise of the power of initiative and referendum offend any other provisions of the federal constitution either. Indeed, they do not. The constitutional provisions requiring signatures, and the Public Records Act that makes such signatures public records, are content-neutral and equally applicable to all citizens

regardless of gender, color, creed, class, belief system or political persuasion.

Petitioners attack a general public records statute requiring that, in the absence of a specific exemption, public records in the State must be available for public review and inspection. WASH. REV. CODE § 42.56.070(1) (2006). The Public Records Act, as it applies to referendum petitions, is not over-inclusive or under-inclusive, that certain documents are subject to public disclosure when only a limited type of record should be covered.

There is no dispute that the Public Records Act is content-neutral. It contains no requirement, for instance, that only certain types of referendum petitions or initiative petitions be made available for public inspection. All such petitions are to be made available. Nor is there any argument that the Public Records Act discriminates or impedes the ability of any minority or historically persecuted group to speak freely. Rather, the Public Records Act is a content-neutral, nondiscriminatory statute that deals with all public records, one category of which are referendum and initiative petitions.

The state constitution and the Public Records Act do not compel speech. No citizen is required to sponsor legislation, or to sponsor (or not sponsor) legislation of any given type. The law simply requires that citizens identify themselves if they do sponsor legislation, just as the law would require them to identify themselves if they were to run for public office.

5. The Public Records Act Serves Many Important Public Interests

a. Washington's goal of governmental accountability is served by the Public Records Act.

The Public Records Act serves an important governmental purpose – holding government officials accountable for performance of their official duties by making sure that Washington citizens are fully informed about matters of public concern, such as referendum and initiative petitions.

Washington courts have repeatedly recognized that the Public Records Act gives full effect to strong state policy making government accountable to the people:

> The stated purpose of the Public Records Act is nothing less than a preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people risks becoming government of the people, by the bureaucrats, for the special interests.

Progressive Animal Welfare Soc'y v. Univ. of Wa., 884 P.2d 592, 597 (Wash. 1994).

In the same opinion, the Washington Supreme Court referenced the potential devastating impact of lack of information:

> In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."

Id.

The making of statute law is a highly important function of a democracy. Referendum and initiative, in Washington, are constitutionally-sanctioned law making powers. Making referendum petitions available for public review promotes sovereignty of the people and accountability of government officials and institutions in at least three different ways.

b. Public availability of petitions allows for oversight of validation process.

Only Washington voters can sign the referendum petitions and the information in the petitions must include printing of the signer's name, address, town or city, and county of residence. WASH. REV. CODE § 29A.72.130, 150 (2005). Once the petitions are submitted to the Secretary of State, State officials must validate whether the signers are, in fact, voters in the State of Washington. If a citizen disagrees with the State officials' validation determination, any citizen can bring a lawsuit challenging the State's validation of signatures. WASH. REV. CODE § 29A.72.240 (2005). However, oversight of the government officials' actions is denied if citizens are not given the opportunity to review the signatures that have been submitted. If

petitions cannot be publicly disclosed, there is no mechanism for oversight. Denying citizens the right to view the petitions to determine whether a court challenge should be brought guts the statutory right all Washingtonians have to challenge initiative and referendum proceedings and renders impossible citizen oversight of the validation process, undercutting the concept of accountability.

c. Making petitions publicly available promotes citizens being fully informed.

Secondly, having the petitions available for public review allows citizens to be fully informed as to how they may choose to vote on a particular measure. Many times, voters' decisions on how to vote on a ballot measure are determined by who the supporters of the ballot measure are. Have the referendum petitions been signed only by the supporters of a particular special interest group? Are the signers of the petitions all located in a specific geographic area or do the petitions suggest broad-based support for the ballot measure throughout the State? Have the petitions been signed by elected leaders? By influential private citizens? If petitions are not made available for public review, answers to these questions cannot be provided and citizen voters will be deprived of full information concerning a decision to support or oppose a ballot measure.

d. Public availability of petitions lessens promotion of frivolous referendum measures.

Third, the concept of accountability also applies to citizens who, in exercising state constitutional power to act as legislators, are accountable to their fellow citizens in directing that legislation be placed on the ballot. If anonymity is accorded to petitioners, citizens exercising their constitutional authority as legislators can escape accountability to their fellow citizens – the result very possibly being that frivolous measures will be placed before the voters for consideration, or that the same individuals time and again will be the sole sponsors behind proposed legislation.

e. Public availability of petitions fosters public discussions of topics of public interest.

Public discussion is a healthy aspect of democracy. *See Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (discussing the beliefs of "those who won our independence"), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). "Discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.*, at 375.

This Court has recognized that there is a right of the public to receive information. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

> The Constitution protects the right to receive information and ideas. "This freedom (of speech and press) necessarily protects the right to receive." [citations omitted] This right to receive information and ideas, regardless of their social worth, [citation omitted] is fundamental to our free society.

Stanley v. Georgia, 394 U.S. 557, 564 (1969).

The Washington Supreme Court, in analyzing a constitutional challenge to the lobbyists' disclosure requirements of Initiative 276 – the same initiative in which the Public Records Act was adopted – noted that it accepted "as self-evident the suggestion . . . that the right to receive information is the fundamental counterpart of the right of free speech." *Fritz, supra*, at 924. The court stated that the "right of the electorate to know more certainly is no less fundamental than the right of privacy." *Id.*, at 925. In rejecting the constitutional challenge to Initiative 276, the Supreme Court stated that,

> Initiative 276, as we have noted, was created by the people for the express purpose of fostering openness in their government. To effectuate this goal, it is important that disclosure be made of the interests that seek

> to influence governmental decision making. . . . the electorate, we believe, has a right to know of the sources and magnitude of financial and persuasive influences upon government.

Id., at 931.

Petitioners fail to credit the significant interest by the people in the State of Washington in knowing who among their fellow citizens are exercising the legislative power reserved to them under the State Constitution. Petitioners give short shrift to the fundamental principle, as espoused by this Court and as evidenced in the Public Records Act, that the public ought to be able to receive important information about the conduct of government – in this case the exercise by fellow citizens of legislative power under the Washington constitution.

f. The "uncomfortable conversations" Petitioners seek to avoid are healthy debate.

Washingtonians have a right to engage the sponsors of direct legislation in debate. Citizens sponsoring legislation should be available to be petitioned by fellow citizens having views on the subject. Below, Petitioners relied primarily on claims of harassment from other states involving other legislative efforts. As for Washington, Petitioners focused on a statement from the co-director of KnowThyNeighbor.org that that his group hoped to engage Petitioners and other

opponents of the legislation Petitioners sought to submit to referendum in dialogue that might be "uncomfortable for both parties."[12] Petitioners object to such "uncomfortable" conversations and seek to insulate themselves from having to comment on and perhaps defend their decision to set the legislative process in motion. This Court has long recognized the importance of open and free political debate, and the sometimes heated exchanges that come with it:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental

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[12] The Petitioners take this "uncomfortable conversation" language from a Press Release and Statement and Statement from KnowThyNeighbor.org's co-director, Aaron Toleos. (9th Circuit Excerpts of Record, 105). The full quote is, "[T]hese conversations can be uncomfortable for both parties, but they are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common." *Id.* Thus, the Referendum 71 opponents appeared to seek dialogue to bring the parties together rather than instigating divisive confrontations.

> principle of our constitutional system.' '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' 'The First Amendment, said Judge Learned Hand, presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'

New York Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964) (internal citations omitted).

This Court has stressed that "profound national commitment to the principle that debate and public issue should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on those officials or individuals who speak out on behalf of a particular principle. *Id.*, at 270.

If "uncomfortable" conversations turn into unacceptable and illegal conduct, there is redress under state law for limiting such inappropriate conduct.

g. Anonymous action is not necessarily beneficial.

The operative truism behind Petitioners' argument is that secrecy emboldens people to do what they otherwise would not do for fear of being

observed. That principle cuts two ways, however: On the one hand, secrecy may embolden citizens to participate more fully in their democracy than they would if they must act openly but in fear of criticism or intimidation. On the other hand (as the examples from other elections in other states furnished by Petitioners and amici demonstrate) secrecy may embolden people to engage in vile, threatening, or illegal speech and actions that they might otherwise avoid out of a sense of shame or fear of detection. Washington's strong public policy in favor of transparent government springs from the idea that public oversight inspires honest, decent behavior.

Washingtonians accept that all people have a Constitutional right to speak freely and anonymously (at some cost to people like Petitioners). And they have provided a state constitutional right to vote in secret on the belief that secrecy at the ballot box best protects the most essential right in a democracy. But they decided that the process of propounding legislation should be a public process; that it is not in their interest as citizens that people should be able to sponsor legislation in secret, for which they can then secretly advocate and on which they can later secretly vote, but rather that sponsors of legislation must declare themselves. That balance was rational, and this Court should "not find that this is an unconstitutional choice." *Burson, supra*, at 210.

h. Petitioners direct their arguments to the wrong audience.

If Petitioners believe that Washington has struck the wrong balance between transparency and free exercise of the right to initiate legislation, they are free to try to persuade the people of Washington to change it to a different balance more amenable to Petitioners' views, within the broad range of possibilities the Constitution allows.

F. Washington Law Does Not Authorize Official Retaliation Against Those Who Exercise Their Right Of Direct Popular Legislation, And Does Not Tolerate Harassment Of Those Who Would Exercise Direct Popular Legislative Power

Washington Law Forbids the Kind of Harassment of Which Petitioners Complain

Harassment is a crime in Washington. *See* WASH. REV. CODE § 9A.46.010, *et seq.* (2009); WASH. REV. CODE § 9A.46.110 (2009); WASH. REV. CODE § 9.61.230 (2009); WASH. REV. CODE § 9.61.260 (2009). Its legislature has declared that "the prevention of serious, personal harassment is an important government objective. Toward that end, this chapter is aimed at making unlawful the repeated invasions of a person's privacy by acts and threats which show a pattern of harassment designed to coerce, intimidate, or humiliate the victim. The legislature further finds that the protection of such persons from harassment can be accomplished without infringing on constitutionally

protected speech or activity." WASH. REV. CODE § 9A.46.010 (2009).

Harassment of a petition signature gatherer is expressly made a violation of that law. WASH. REV. CODE § 29A.72.110 (2005).

In addition to the laws criminalizing harassment, Washington's code includes a civil remedy. In furtherance of the same purpose declared in the criminal statute, quoted above, Washington's legislature provided a "speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator." WASH. REV. CODE § 10.14.010 (2002). Petitioners have themselves not been harassed or threatened; they have not attempted to avail themselves of remedies available in Washington law.

These and similar laws are deemed sufficient in Washington and every state in the Union to deter threats and harassment of other actors in our public political affairs. Petitioners have not set out any principled basis explaining why citizens who inject themselves into the lawmaking function by direct popular legislation should be anonymous, when other actors in the political process are not. It is incumbent on Petitioners to explain why they, as citizens who inject themselves into the public legislative process, should be immune from amenability to debate or the kind of criticisms typically aimed at public officers, who enjoy no putative Constitutional privilege to make law in secret.

G. Petitioners Cannot Sustain Their Claim Of Facial Invalidity

Petitioners' lawsuit in Federal District Court is divided into two causes of action. The first cause of action requested a determination that the Public Records Act was unconstitutional on its face in requiring disclosure of any referendum petition. The second cause of action sought a determination that the Public Records Act was unconstitutional, as applied in this case. In issuing the preliminary injunction, the District Court ruled solely on the first cause of action, the facial challenge. The second cause of action, which requires an exploration of the facts relating to the potential impact of disclosure on the signers of petitions, has not been addressed.

Thus, the procedural posture that is presented to this Court is the request by Petitioners that the Public Records Act be declared per se unconstitutional to the extent it requires disclosure of signatures on referendum or initiative petitions, regardless of the nature of the subject matter of the petitions.

As the Court said recently in a decision upholding Washington's primary ballot against Constitutional challenge, "[f]acial challenges are disfavored for several reasons" including that they frustrate the popular will and risk foreclosing statutes based on hypothetical rather than concrete issues. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-451 (2008).

CONCLUSION

Signing a referendum petition in the State of Washington is the exercise of legislative power under the State Constitution. Signing a petition may thus be distinguished from soliciting signatures on referendum petitions and from restrictions as to who may circulate a petition or what identification they must carry. While such actions have been construed by this Court to constitute core political speech, the act of signing a petition is an essential act of legislation and not a purely hortatory, interactive communication to which the standards concerning core political speech are applicable.

It is true that citizens who seek to lead in a democracy attract the attention of both their supporters and their detractors, and that the latter may abuse their privilege of anonymous speech to make vile comments and even frightening threats. That fact however has never been thought to justify a power in our governmental leadership routinely to operate the machinery of government in secret. The people of Washington have decided that every citizen shall have the power to engage the machinery to make statute law, but that they must do so publicly. Washingtonians had the right to make that decision, balancing their twin desires, in pursuit of self-government as the ultimate sovereign, that direct popular legislation be available and that governmental workings be as transparent as possible. The Founders, who so conspicuously signed the Declaration of Independence at the risk of their very lives,

would not have insisted on the power to override Washingtonians' choice.

RESPECTFULLY SUBMITTED this 25th day of March, 2010.

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RESPONDENT'S BRIEF

MAR 25 2010
OFFICE OF THE CLERK

No. 09-559

In the

Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and PROTECT MARRIAGE WASHINGTON,
Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT WASHINGTON FAMILIES STANDING TOGETHER

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March 25, 2010

QUESTION PRESENTED

Whether Washington's Public Records Act violates the First Amendment by requiring public disclosure of referendum and initiative petition sheets signed and collected in public and then voluntarily submitted to state government officials for the purpose of (a) temporarily suspending state law and (b) requiring the inclusion of the issue on a general election ballot.

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BRIEF FOR RESPONDENT WASHINGTON FAMILIES STANDING TOGETHER

PERTINENT STATUTES AND RULES

The appendix to Respondent Washington Families Standing Together's Brief in Opposition to Petition for Writ of Certiorari (WAFST App.) contains the full text of article II, Section 1, of the Washington Constitution and certain pertinent statutory provisions. The other pertinent statutes and rules are set forth in the appendix to the Petition (Pet. App.).

STATEMENT OF THE CASE

This case arises from the application of Washington's Public Records Act to petitions submitted to the State by sponsors of a referendum that sought to suspend and ultimately repeal a domestic partnership statute enacted by the Washington Legislature ("Referendum 71").

The sponsors of Washington's Referendum 71 collected signatures in public locations around the State. Under Washington law, only the signatures of lawfully registered voters are eligible to be counted, and protecting the process from fraud and irregularity is an increasingly difficult challenge. Washington law reasonably regulates the referendum process and requires careful scrutiny and canvassing of the referendum petitions to ensure that only eligible signatures are counted toward the qualification threshold.

Washington Families Standing Together ("WAFST") is a coalition of individuals, advocacy and religious groups, businesses, and non-profit entities that support the domestic partnership legislation. WAFST opposed the effort to place the referendum on the ballot and, once Referendum 71 was certified, WAFST advocated for voter approval of the original legislation.

During the canvass of the Referendum 71 petitions, WAFST sought access to the petitions to ensure that a sufficient number of lawful voters had signed the petitions, a step that is not only routine under Washington law, but consistent with the law of virtually every other state with a referendum or initiative process. Before the Referendum 71 petitions could be released to WAFST, however, petitioners filed this lawsuit and obtained a federal court injunction barring the State from disclosing the petitions. WAFST promptly intervened to protect the interest that both it and the public have in the integrity of the initiative and referendum process.

A. Petitioners Chose to Avail Themselves of Washington State's Referendum Process

1. Washington Provides for a Closely Regulated Initiative and Referendum Process

In 1912, Washington amended its constitution to include the right of the people to legislate directly by initiatives or referenda. Wash. Const.

art. II, § 1 (amended by 1911 H.R. No. 153 (approved Nov. 1912)). The constitution now reads:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

Wash. Const. amend. 7 (WAFST App. 1a). The referendum process serves as a limited check on Washington's representative form of government, reserving to the majority of voters the power to overturn legislation. *See, e.g., 1000 Friends of Wash.* v. *McFarland*, 149 P.3d 616, 618 (Wash. 2006) ("The electorate also plays a vital role in checking the exercise of power by elected officials through the initiative and referendum process.") (citation omitted). Of course, nothing in the federal constitution *requires* a state to provide such a referendum and initiative process, and a state retains the power to reasonably regulate the conduct of the time, place, and manner of not only

its general elections but the initiative and referendum process as well. U.S. Const. art. I, § 4.

Thus, the right to legislate through initiative and referendum is neither constitutionally required nor unlimited. It is subject to specific procedural limitations in Washington's constitution and through state statutes designed to protect the integrity of the referendum, initiative and larger electoral process. Petitioners do not challenge these limitations or procedures, save for Washington's requirement that referendum and initiative petitions, once submitted, are government records subject to public disclosure, allowing interested individuals to ensure the integrity of the process. *See* Petitioners' Brief at 12.

For example, while Washington does not require anything close to a majority of voters to support placing a proposition on the ballot, it does closely regulate the initiative and referendum process to assure a real and meaningful level of support. Petitions must be printed in a certain format. Each petition sheet is to have "lines for not more than twenty signatures," WASH. REV. CODE § 29A.72.100 (WAFST App. 6a), and the petition for Referendum 71 had exactly twenty, Pet. App. 29a-30a. Voters must print and sign their names and state their addresses, including the city and the county in which they are registered to vote. WASH. REV. CODE § 29A.72.130 (WAFST App. 6a-8a). Absence of a signature, a printed name, or an

address renders an individual's signature invalid. *See* WASH. REV. CODE § 29A.72.230 (authorizing the Secretary of State to accept signatures only from legal voters) (Pet. App. 49a).

A measure to approve or disapprove an act of the legislature will not be put to a vote of the people until a "petition *signed* by the required percentage of the *legal voters*" is submitted to the Secretary of State. Wash. Const. art. II, § 1(b) (emphases added) (WAFST App. 3a). A petition seeking to place a referendum on the ballot must have "valid signatures of registered voters" that "equal . . . or exceed[ ] four percent of the votes cast for the office of governor at the last gubernatorial election." *Id.* State workers compare signatures on the petition sheets to voter registration card signatures to confirm that the signatures are genuine, *see* Wash. Admin. Code § 434-379-020, a process that is imperfect at best.

Typically, petition circulators gather signatures in public places where they will find large numbers of citizens, such as community events, county fairs, churches, in front of stores, or shopping malls. *See, e.g.*, John Doe Decl. #4 in Support of Motion for Preliminary Injunction ¶ 8 (Dkt. #53 at 2) (discussing collection of signatures in front of Wal-Mart, Target, and Fred Meyer); John Doe Decl. #5 in Support of Motion for Preliminary Injunction ¶ 5 (Dkt. #54 at 2) (same). All signatures, names, and addresses on the petition sheet are easily viewable not just by the petition circulator or organizer, but

by any other signer or possible signer who stops to review the petition.

Indeed, many more than the other people—up to nineteen—who sign the same sheet may review each signature on a petition. A circulator may show a petition sheet to dozens of individuals before it is full. Petition sheets are sometimes posted or left on a table. Circulators typically clip completed petition sheets behind other blank petition sheets, and thus a potential signer (or someone having no intention of signing or who has already signed the petition) may freely review and record the names on the other sheets.

Petitions voluntarily submitted with a facially sufficient number of signatures are subject to further disclosure as part of the verification process by State officials. WASH. REV. CODE § 29A.72.230 (Pet. App. 49a). State workers canvass the petitions, checking for duplicate signatures, signatures by individuals not registered to vote, or signatures and other required information that do not match voter registration records. For Referendum 71, the Secretary of State rejected more than 10 percent of the more than 137,000 signatures submitted—determining that the measure had just 1,200 more than the minimum threshold. *See Certification of Referendum 71* (Sept. 2, 2009), http://tinyurl.com/yf9xhej (last visited Mar. 23, 2010); Second Hamlin Decl. ¶ 2, Ex. 2, filed in *Washington Families Standing Together v. Reed*, No. 09-2-02145-4 (Dkt. #24).

By statute, proponents and opponents of the referendum petition may observe the verification process, including the review of names, signatures, and addresses against the voter registration database. WASH. REV. CODE § 29A.72.230 (Pet. App. 49A). Anyone not satisfied with the end result has the right to appeal the Secretary of State's ultimate determination as to the sufficiency of the number of valid signatures. *Id.* § 29A.72.240 (Pet. App. 50a); *see also Filing Initiatives and Referenda in Washington State, 2009 through 2012*, http://tinyurl.com/ykrkze7 (last visited Mar. 23, 2010).

The submission of a referendum petition with a sufficient number of lawful signatures has immediate legal effect: it delays implementation of the legislation at issue until after the next general election. *See* Wash. Const. art. II, §§ 1(b), (d) (WAFST App. 3a, 4a). As a result, the petition does not merely serve as a legal command to State officials to place the measure on the ballot; it *also* suspends the operation of the new law for several months until after the next general election.

2. Signature-Gathering Fraud Exists in Washington and Elsewhere

Initiative and referendum activity in recent years has been marred by incidents of signature-gathering fraud and misconduct—a growing and significant threat to the fair administration of the electoral process.

In Washington, hundreds of forged signatures were discovered on petitions submitted shortly after the State first allowed the use of paid signature-gatherers. *See Wash. Initiatives Now* v. *Rippie*, 213 F.3d 1132, 1136 (9th Cir. 2000); *see also Property-Rights Initiative Passes Legal Muster*, Seattle Times, Feb. 13, 1995, *available at* http://tinurl.com/ydkr2m6 (discussing discovery of hundreds of forged signatures on an initiative) (last visited Mar. 23, 2010). In October 2002, a single paid signature-gatherer apparently signed multiple signatures on a Washington initiative. *See Fraud Case Turned Over to Prosecutor's Office*, http://tinyurl.com/ykznycx, Oct. 7, 2002 (last visited Mar. 23, 2010). Most recently, the media reported that a deceased paid signature-gatherer in Washington left behind evidence suggesting forgery of initiative signatures. *Petition Forgeries Spark Legislative Debate*, The Spokesman-Review, Feb. 27, 2010, *available at* http://tinyurl.com/yljagbt (last visited Mar. 23, 2010).

Other areas of the country have experienced similar problems. In 2004, for example, a campaign to legalize slot machines in the District of Columbia halted when the D.C. Board of Elections and Ethics threw out thousands of fraudulent signatures gathered during the petition drive, finding that the petitions contained "a pervasive pattern of fraud, forgeries and other improprieties." Lori Montgomery, *Campaign for Slots in D.C. Crumbles*, Wash. Post, Sept. 29, 2004, at B1.

In Massachusetts, in 2006, after hearing of concerns of potential fraud, opponents of a measure publicly posted online information from signed petitions so that any voter could see whether his or her signature was listed. This generated numerous complaints to the Massachusetts Secretary of State from voters who determined that they were listed as having signed when they had not. In fact, so many voters complained that the Massachusetts Secretary of State referred the matter to state prosecutors for investigation. Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Boston Globe, Feb. 28, 2006, *available at* http://tinyurl.com/yj8m3nv (last visited Mar. 23, 2010); Rebecca Fater, *Trickery is Alleged in Gay Marriage Drive*, The Berkshire Eagle, Jan. 27, 2006, *available at* http://tinyurl.com/yzrfthx (last visited Mar. 21, 2010) ("Next thing I know, someone is telling me I'm on the Internet as having signed a petition against gay marriage."). The authorities were made aware of the irregularities only as a result of the public being able to review petition signatures.

In 2006, the Montana Supreme Court invalidated thousands of signatures, finding that non-resident signature-gatherers had forged false addresses and used deceptive "bait and switch" tactics to collect signatures. *See Montanans for Justice* v. *Montana*, 146 P.3d 759, 776 (Mont. 2006).

In 2008, the Oregon Supreme Court affirmed the racketeering conviction of a political action

committee for forging signatures to qualify two ballot measures and filing false statements concerning expenditures and contributions with the intent to force the plaintiffs to expend money to defeat the measures. *Am. Fed'n. of Teachers-Or.* v. *Or. Taxpayers United PAC*, 189 P.3d 9, 24 (Or. 2008).

Even more recently, a Maryland casino developer filed suit against the Anne Arundel County Board of Supervisors of Elections, alleging that board officials had not investigated suspicious practices in the petition-gathering process and the existence of a large number of fraudulent signatures among those collected. Nicole Fuller, *Cordish Attacks Anti-Slots Petitions; Elections Board Failed to Check for Fraud, Other Irregularities, Lawsuit Says*, Balt. Sun, Feb. 4, 2010, at 2A, *available at* 2010 WLNR 3890107. The allegations were based in part on the opinion of a forensic document analyst, hired to examine the petition signatures, who found "a pattern of insertions, alterations, entries and signatures not signed by the person it purports to be." *Id.* It was the public availability of the petition signatures that allowed the plaintiff to conduct his own investigation when he perceived that the board of supervisors had insufficient safeguards in place.

These examples are not isolated. Signature-gathering fraud is occurring with distressing frequency across the nation. Courts have identified fraudulent signature-gathering activity in

Oklahoma, *In re Initiative Petition No. 379*, 155 P.3d 32, 34 (Okla. 2006); Michigan, *Operation King's Dream* v. *Connerly*, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at *33 (E.D. Mich. Aug. 29, 2006); Ohio, *Nader* v. *Blackwell*, 545 F.3d 459, 462 (6th Cir. 2008); and Arizona, *Nader* v. *Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008); *see also Floridians Against Expanded Gambling* v. *Floridians for a Level Playing Field*, 945 So. 2d 553, 561 (Fla. Dist. Ct. App. 2006) (discussing that appellants asserted "substantial fraud occurred in the petition-gathering process" and certifying issues to the Florida Supreme Court), *review granted by* 952 So. 2d 1189 (Fla. 2007).[1] Signature-gathering fraud, in

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[1] *See also* Rebekah Metzler, *Lawmakers weigh fraud, free speech in petition process*, Sun J. (Lewiston, Me.), Feb. 23, 2010, *available at* 2010 WLNR 3782702 (describing a push by Maine lawmakers to further regulate the ballot initiative signature-gathering process to curb fraudulent practices); *Initiative Petitioner Prosecuted for Signature Fraud*, U.S. Fed. News, Mar. 13, 2009, *available at* 2009 WLNR 4814555 (describing the successful prosecution of an Oregon petition-gatherer who submitted three pages of fraudulent signatures for a state referendum campaign), Melissa Lee, *Cries of Fraud Aimed at Initiative, Affirmative Action Opponents Accused of Illegal Activity in Collecting Signatures*, Lincoln J Star (Neb.), June 26, 2008, *available at* 2008 WLNR 12263142 (describing allegations of fraud in Nebraska ballot initiative signature-gathering process, including petitioners filling out information for signers and the use of false names on signature sheets), Andy Vuong, *Labor Alleges Petition Fraud Right-to-Work Initiative Foes Will Contest Signatures*, Denver Post, May 23, 2008, *available at* 2008 WLNR 9802563 (describing impending Colorado lawsuit arising from alleged

short, is a significant threat to the fair administration of those elements of the electoral system where such petitions are utilized, such as efforts to qualify a candidate for the ballot, recall an elected official, propose legislation be added to a warrant for a town meeting, or implement or repeal legislation at the municipal, county, or state level.

3. The Public Has the Right to Access the Signed Petitions for an Initiative or Referendum

In 1972, Washington voters, by initiative, enacted the Public Records Act, broadly requiring the public disclosure of government records with limited exceptions. The Public Records Act was designed to facilitate the people's insistence "on remaining informed so that they may maintain control over the instruments that they have created." WASH. REV. CODE § 42.56.030 (WAFST App. 9a). The Act declares in its statement of purpose that "[t]he people . . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.* The Washington Public Records Act is a "strongly-worded mandate for open government,

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fraudulent signature-gathering practices for a ballot measure campaign); Alan Johnson, et al., *Strip-club law might miss ballot: Most petition signatures invalid, some fraudulent*, Columbus Dispatch (Ohio), Sept. 21, 2007, *available at* 2007 WLNR 18554820 (describing attempts of an Ohio ballot initiative campaign to find new petition signers after nearly two-thirds of their signatures were invalidated as either errors or fraud)

requiring broad disclosure." *Rental Housing Ass'n of Puget Sound* v. *City of Des Moines*, 199 P.3d 393, 394 (Wash. 2009).

Although there are some exceptions to the strong and general mandate for public disclosure, the public did not except initiative and referendum petitions. The Public Records Act, however, does provide a mechanism for instances in which public disclosure of a government record is proven to threaten an individual's right to privacy. WASH. REV. CODE § 42.56.050 (exempting documents from disclosure to protect a person's right to privacy); *id.* § 42.56.540 (allowing court to bar public access to any public record where "such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions").

The Secretary of State determined, as he had for prior initiatives and referenda, that Referendum 71 petitions filed with his office were government records covered by the Public Records Act, and that no statutory exemptions to the Act applied.[2]

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[2] *See generally* Posting of Brian Zylstra to From Our Corner, (Sept 17, 2009), http://tinyurl.com/ycb2e2y (last visited Mar. 23, 2010). In what appears to be an effort to challenge the Secretary of State's judgment, petitioners now assert that the Public Records Act does not require the disclosure of the petitions. *See, e.g.*, Petitioners' Brief at 9 n.18 & at 51 (citing 1938 & 1956 Washington Attorney General Opinions issued prior to adoption of Public Records Act) These are matters of

B. Petitioner Protect Marriage Washington Sponsors Referendum 71

Petitioner Protect Marriage Washington ("PMW") is the sponsor of Referendum 71, which sought to repeal Washington's newly enacted domestic partnership law. Most elements of the legislation were scheduled to become effective July 26, 2009. E.2.S.S.B. 5688, 2009 Wash. Sess. Laws ch. 521. Opponents of the law, however, could delay its effective date by filing a petition for a referendum within 90 days of the end of the legislative session. Wash. Const. art. II, § 1(b), (d) (WAFST App. 3a, 4a). To delay the legislation until after the November 2009 general election, and to put the measure before the voters, PMW needed to submit petitions signed by at least 120,577 legally registered voters by July 26, 2009. *See id.* § 1(b) (App. 3a).

On May 4, 2009, PMW filed its proposed referendum. *See History of Referendum Measures Through 2009, available at* http://tinyurl.com/ya3ae7u (last visited Mar. 23, 2010). PMW prepared individual petition sheets with twenty signature lines, the maximum number allowed by statute. *See* WASH. REV. CODE § 29A.72.100 (WAFST App. 6a). It did not seek an advance ruling from the

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state law and therefore not appropriate for resolution by the Court. Moreover, the parties, the district court, *and* the court of appeals all proceeded throughout the course of the litigation from the conclusion that Washington law required the disclosure of these records.

Secretary of State or the state courts that potential harm to signers required that these petitions be exempted from the Public Records Act.

PMW then gathered signatures for the Referendum 71 petitions in public locations across the State of Washington, including churches and outside of major retail stores. *See, e.g.*, John Doe Declarations (Dkt. ## 53 at 2, 54 at 2). Petitioners have offered no evidence that any individuals refused to sign the petitions out of concern that their identities would become known. Indeed, given the preliminary injunction procedural posture of this case, the parties have not yet engaged in any discovery into the circumstances surrounding the John Doe petitioners' signing of the petitions, let alone any other signers. The record, accordingly, does not indicate where petitioners signed or whether they publicly disclosed the fact that they signed.

After PMW submitted petition sheets with approximately 138,000 signatures, the Secretary of State concluded that he needed to conduct a full review of all the signatures because so few signatures above the minimum had been submitted. *See Certification of Referendum 71* (Sept. 2, 2009), *available at* http://tinyurl.com/yf9g4o6 (last visited Mar. 23, 2010). The Secretary of State therefore canvassed the petitions, checking the names and signatures on the petitions to ensure that PMW had submitted the required number of valid signatures of legally

registered voters. *See* WASH. REV. CODE § 29A.72.230 (Pet. App. 49a).

Pursuant to statute, both proponents and opponents of the referendum petition, as well as members of the media, were able to observe the verification process. These observers had ready access to individual names, signatures, *and* addresses as they monitored the canvass and sought to assure that the process was fair.

Indeed, an excellent example of the importance of such access can be identified in petitioners' own behavior during the canvass. Proponents of Referendum 71 used information from this process to intervene and correct the Secretary of State's canvassing efforts. The proponent's observers noted the name of an individual who had signed the petition but whose signature had been rejected. Recognizing the name as the daughter of their campaign manager, the observers contacted the campaign manager in order to have the daughter's (initially rejected) signature counted. Beane Decl. in Support of Plaintiff's Motion for Injunctive Relief, Ex. B at ¶ 8, filed in *WAFST* v. *Reed*, No. 09-2-02145-4 (Wash. Super. Ct. Thurston County Sept. 3, 2009) (Dkt. #7). The Secretary of State considered the additional information, reversed the initial decision, and accepted the signature. *Id.* But for public oversight and access to the signatures and names, that error would have gone uncorrected. That said, it was coincidence that one of the observers happened to recognize a particular

name during the canvassing process. Had a complete set of petitions been released, as they routinely are in Washington and elsewhere, it is likely that a far greater number of such errors would have been identified and corrected.

Early in the signature-gathering process, because of reports about Referendum 71 signature-gatherer tactics (and with knowledge of the history of fraud in other petition drives), WAFST became concerned that potentially fraudulent tactics might affect whether Referendum 71 qualified for the ballot.[3] WAFST's concerns grew when it learned of PMW's widespread failure to have each signature-gatherer sign a declaration on the back of each petition attesting that every signer signed the petition "knowingly and without any compensation or promise of compensation" and "willingly signed his or her true name and that the information provided therewith is true and correct." *See* WASH. REV. CODE § 29A.72.130 (Pet. App. 6a); Handy Decl. ¶ 19, filed in *WAFST* v. *Reed*, No. 09-2-02145-4 (Wash. Super. Ct. Thurston County Sept. 4, 2009) (Dkt. # 9).

Moreover, during the review process, WAFST observers identified numerous instances where it appeared that State workers accepted signatures

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[3] The Secretary of State initially determined that there were 122,007 valid signatures on PMW's petitions, only 1,430 signatures more than the 120,577 needed to qualify the measure for the ballot. He later revised that number downward to 1,200. *See supra* p. 6.

that did not match registered voters or had other irregularities. Smith Decl. ¶ 7 (Dkt. #44). Ultimately, concerned that the process was tainted despite the Secretary of State's best efforts to oversee and regulate the canvassing, WAFST sought copies of the petitions in order to check for fraud in the signature-gathering process.[4]

C. Petitioners Begin Litigation

Petitioners commenced this action on July 28, 2009, after the deadline for gathering signatures for Referendum 71 had passed and the sponsors had submitted sufficient signatures to commence the signature verification process. The district court granted WAFST's motion to intervene based on WAFST's request for copies of the petitions and related information under the Public Records Act. WAFST had made the request for the records to prepare for a potential legal challenge, pursuant to

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[4] On August 12, 2009, WAFST submitted its first Public Records Act request seeking copies of the petitions. *See* Defendants' Reply in Support of Motion to Join Additional Parties, Ex B (Dkt. #30). By then, however, the district court had entered its temporary restraining order ("TRO") in this action barring the Secretary of State from complying with the Public Records Act by releasing the signed petitions. In light of the TRO, the Secretary of State refused to provide *any* of the requested information (Dkt. # 43 at 1-2) On August 27, 2009, WAFST submitted another request under the Public Records Act, this time seeking additional public records relating to the process for canvassing the signatures on the Referendum 71 petitions, including the signed petition sheets. (Dkt. # 45 at Ex B).

WASH. REV. CODE § 29A.72.240 (Pet. App. 50a), to certification of the referendum. Dkt. ## 43, 62.

Petitioners' complaint objected to the public disclosure of petitions on two grounds. First, petitioners asserted that it was unconstitutional under the First Amendment for the State to disclose *any* referendum or initiative petitions under any circumstances. Compl., Count II (Dkt. #2); *see also* Pet. App. 24a. Second, petitioners asserted that the disclosure of Referendum 71 petitions was unconstitutional "because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." Compl., Count II (Dkt. #2); *see also* Pet. App. 24a. The complaint was based entirely on federal law. Petitioners did not at any time seek to narrow public disclosure pursuant to the Public Record Act's own protective provisions. Instead, petitioners rushed to federal court to challenge the statute on federal constitutional grounds both facially (Count I) and as it applied to Referendum 71 (Count II). With virtually no notice, and without opposition from the State, petitioners sought and obtained a TRO barring disclosure. Notwithstanding Federal Rule of Civil Procedure 65(b)(2), the district court's order purported to bind the State from July 28 through the date of the preliminary injunction hearing, September 3, 2009, thereby foreclosing WAFST's ability to effectively challenge the Secretary of State's certification of Referendum 71 for the ballot under WASH. REV. CODE § 29A.72.240. (Dkt. #9).

On September 3, 2009, the district court entertained argument on petitioners' motion for preliminary injunction. The district court did not take testimony, and the only factual record before the court was three declarations submitted by John Does, documents attached to the Complaint, and several attorney declarations attaching news reports. There had been no opportunity for discovery, and not a single witness appeared at the hearing.

On this limited record, the district court concluded that petitioners were entitled to relief under Count I of the Complaint and explicitly declined to reach the question—presented only by Count II—whether the alleged threats of harassment justified exempting the petitions from disclosure under the "reasonable probability" of harm standard from *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*Buckley I*); and *NAACP* v. *State of Alabama*, 357 U.S. 449 (1958). Pet. App. 43a.

The court of appeals reversed, holding that the act of signing a petition was not anonymous and was a mixture of speech and conduct, such that intermediate scrutiny applied. Pet. App. 3a. The court of appeals held that the Public Records Act as applied to the petition sheets served important interests of open government, public disclosure, and protecting against fraud. Pet. App. 19a.

The court of appeals did *not* consider Petitioners' as-applied challenge to the disclosure of the Referendum 71 petitions, because the trial court did not address that second claim. Pet. App. 10a n.6. Nevertheless, petitioners devote the majority of their merits brief to matters relevant only to an as-applied challenge. Rather than focus on the facial challenge that is before the Court, petitioners discuss the "harm" and "intimidation" that allegedly arose during the Referendum 71 campaign and, even more remotely, California's Proposition 8, which was an initiative dealing with marriage rights for same-sex couples. To the extent that such a discussion is material, its relevance is limited to Count II, which petitioners concede is not before the Court. *See* Reply to Opposition to Petition for Writ of Certiorari 8 n.2.

SUMMARY OF ARGUMENT

The Court should reject petitioners' constitutional challenge—an attack on a common, reasonable, and content-neutral public disclosure requirement. States are under no obligation to provide an initiative or referendum process in the first instance and must be free to define that process as a public one and to apply reasonable time, place, and manner regulation to ensure its fair administration. With telling and nearly complete unanimity, states treat referendum and initiative petitions as public records.

Petitioners contend that public disclosure of these government records threatens "harassment"

of those who have signed the petitions, but the record before the Court fails to justify an absolute constitutional rule barring disclosure of petitions on any subject under any circumstances. Citizens of Washington and other states have considered initiative and referenda on a wide variety of issues, including some of the most controversial of our time. Yet petitioners have marshaled but one initiative and one referendum, both on a single subject matter, in which some alleged "harassment" occurred, hardly a widespread historical pattern sufficient to support their request for sweeping intervention by this Court into state governance.

The threat to an initiative or referendum process lies elsewhere, and petitioners would only make it worse. With disturbing frequency, the initiative and referendum process has been plagued with signature gathering fraud, illegal activity that threatens the fair administration of the process and one which the states have struggled to control. In numerous instances only *public disclosure* of the petition signatures revealed the fraud, allowing corrective action and, in some instances, criminal prosecution.

In weighing petitioners' constitutional challenge to Washington's public disclosure statute, the Court at most should apply intermediate scrutiny. The voluntary act of taking advantage of the state-created process for signing and submitting a referendum or initiative petition to the state is an act with significant legal effect

wholly separate from any incidental speech component. Washington's Public Records Act easily passes constitutional muster under this (or any other) standard. The statute is a content-neutral, narrowly tailored, and entirely reasonable commitment to open government and to the regulation of the time, place and manner of the initiative and referendum process.

Washington, like the other states with similar requirements, has a strong and compelling interest in not just open government but detecting and deterring fraud in the administration of the referendum, initiative, and larger electoral process. The Court has frequently recognized that strong government interest, and nowhere is that interest stronger than in combating the increasing threat of signature-gathering fraud. Similarly, public disclosure serves strong and compelling informational interests, generally and as repeatedly recognized and protected by the Court, in the political campaign context. Any chilling effect of Washington's public disclosure requirement on expressive activity is not just unproven but, at most, incidental.

Against these strong government interests, consistent historical practice, and nearly unanimous state disclosure practice, petitioners allege minor acts of misconduct and ask the Court to fashion a sweeping constitutional rule. Passionate or even rude or hostile speech relating to a single referendum in one state is not a basis for

overturning reasonable state regulation of state initiative and referendum process and commitment to open government.

ARGUMENT

A. Intermediate Scrutiny Applies to the Public Disclosure of Petitions

The voluntary act of signing and submitting a petition to the government is an act with significant legal effect wholly separate from any incidental speech component. Moreover, states that have chosen to adopt initiative or referendum processes are free to apply reasonable time, place, and manner regulation of the processes, and *all* such states, save for one, routinely disclose referendum and initiative petitions. Petitioners' constitutional challenge—an attack on a common, reasonable, and content-neutral public disclosure requirement—therefore triggers only an intermediate level of scrutiny.

1. Signing a Petition Is a Voluntary and Public Act

First, signing a referendum or initiative petition is neither a private nor an anonymous act. Petitioners argue that signing a petition is a "private act" akin to "anonymous" speech, and that public disclosure of the petitions after they have been submitted to the government constitutes "compelled speech" subject to strict constitutional scrutiny. As the court of appeals recognized,

nothing about signing a petition is anonymous or private. Pet. App. 12a.

A citizen who chooses to sign *must* add his or her name to the petition, and *must* intend the petition to be submitted to the government, for the act to have any effect. A voter signing a referendum petition fully expects that the petition, including his or her name, address, and signature, will be disclosed to the government; disclosure is, in fact, the whole point in signing the petition. Moreover, signatures typically are collected at county fairs, on busy city streets, in crowded shopping malls, or in church or retail shopping parking lots. *See, e.g.*, John Doe Declarations (Dkt. ##53, 54). Citizens signing petitions are doing so publicly; their signatures are placed on sheets available for review by every other citizen who signs (or the much larger number who consider *whether* to sign); and those names, addresses, and signatures may be reviewed and recorded by others and used by the petition proponent for other purposes. Pet. App. 12a. In short, there has been "no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." *Id.* In fact, the limited record before the Court is decidedly to the contrary.

Nor is a petition suddenly cloaked in secrecy *after* an individual signs it. A signer intends that his or her signature will be (and must be) submitted to the state for the petition to have any

effect. A petition signer might also reasonably assume that the petition circulator may use his or her name for other purposes. There is no statutory or regulatory provision (nor language in the Referendum 71 petitions themselves) that tells the petition signer that his or her signature will be kept private and not used for any purpose other than submission to the state. To the contrary, Washington law generally provides a right to records such as these petitions through the Public Records Act and more "specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process." *Id.*

Petitioners' attempt to liken signing a petition to "anonymous speech" fails: the petitions are signed publicly, not anonymously; they are openly displayed; and they are not retained but expressly designed to be delivered to government officials as a legally binding directive. Citizens can speak anonymously in opposition to any legislation, but signing the petition is a legally significant act that is inherently inconsistent with anonymity. Someone can waste one of the lines on the petition by signing as "Anonymous" or by writing in a political statement, but effective support for the petition requires the act of subscribing one's name.

Petitioners largely rely on *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995), in support of their position. In *McIntyre*, the petitioner distributed anonymous pamphlets

advocating a vote against a school levy, and the State of Ohio fined her for failing to comply with a statute that required her to identify herself on any pamphlet advocating a position in an upcoming election. *Id.* at 338. The Court held that such an attempt to regulate and limit political expression was subject to strict scrutiny and was unconstitutional. *Id.* at 345-46.

The facts in *McIntyre* present nearly the opposite situation from the facts in the instant case. Ms. McIntyre expressed her political viewpoint through an anonymous pamphlet; she jealously protected her anonymity; and she never submitted her name, address, or signature to the government in connection with the anonymous pamphlet. Moreover, Ms. McIntyre's pamphlet had no independent legal effect; it was pure speech.

The referendum process under Washington law could scarcely be more different: a citizen signing a petition must provide his or her name, address, and signature, and typically does so publicly; the petitions are usually displayed for public review during the gathering process; and they must all be submitted to the government for review and verification, which is itself observed by third parties. Submitting the signature and other information to the government and making them part of the process of governance is the entire point of the exercise.

For the same reason, *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182

(1999) ("*Buckley II*"), which held that requiring a petition circulator to wear a name tag was unconstitutional, is distinguishable from the act of signing a petition. A circulator of a petition does not have to disclose his or her identity to perform his or her job.[5] That is not true of a petition signer, who by definition must provide his or her full name, signature and the address at which he or she is legally registered to vote for the act of signing to have any legal meaning.

Petitioners' attempt to characterize petition signing as a secret act, like voting, in which the "speech" is disclosed only to the government, is similarly flawed.[6] Voting in federal and in all state elections is done in private; voters have an expectation of privacy; and federal and state laws protect the secrecy and anonymity of the ballot. *Republican Party of Minn.* v. *White*, 536 U.S. 765, 786-87 (2002) (contrasting the "relatively new" and "still not universally adopted" practice of restricting judicial candidates' speech during elections to the "tradition of prohibiting speech around polling

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[5] In many states, the circulator does need to sign the petition before it is submitted to the government, and the Court upheld such a requirement in *Buckley II*, 525 U.S. at 196.

[6] The more apt analogy is to what legislators do, and the Washington Constitution requires that they be identified by name. Wash. Const. art. II, § 22 ("No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house"); *see also id.* §§ 1(c), 11.

places that began with the very adoption of the secret ballot in the late 19th century, and in which every State participated"); *Burson* v. *Freeman*, 504 U.S. 191, 206 (1992) ("After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments.").

No such history or expectation is present here. The consistent practice of the states that have adopted initiative and referendum processes is exactly to the contrary: Nearly all states *release* copies of petitions upon public request. *See* Ballot Initiative Strategy Center, *Ballot Integrity: A Broken System in Need of Solutions, A State by State Report Card* (July 2009) http://tinyurl.com/yktzoxf (last visited Mar. 23, 2010). Citizens signing petitions reveal only their participation in the referendum process; they do not reveal their votes.[7]

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[7] In fact, a closer analogy is to the release of voter registration information and voting history, both of which are routinely disclosed by state election officials and which form the basis of get-out-the-vote efforts for political campaigns. *See, e.g.*, ARIZ. REV. STAT. § 16-168(C); COLO. REV. STAT. § 1-2-302; 10 ILL. COMP. STAT. 5/1A-25, IOWA CODE ANN. § 48A.39, ME. REV. STAT. ANN. 21-A, § 22; N.H. REV. STAT. ANN. § 654.31-a; TEX. ELEC. CODE § 13.122. Disclosure of such information also serves government interests in detecting and deterring fraud, promoting confidence in the fair administration of elections, and providing relevant information to voters, candidates, and political committees. *Cf. Krislov* v. *Rednour*, 226 F.3d 851,

Petitioners refer to cases in which courts have held that information privately disclosed to the government is exempt from public disclosure. The precedent is readily distinguishable. Each of these cases either involve private information with no legal effect that was never public (unlike petition signatures) or specific exemptions from public disclosure laws based on interests not at issue here.

Two cases identified by petitioners, *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *AFL-CIO* v. *Federal Election Commission*, 333 F.3d 168 (D.C. Cir. 2003), involve information that—unlike referendum and initiative petitions—was never made public.

In *Reporters Committee*, the Court undertook a detailed analysis of the Freedom of Information Act ("FOIA") to determine that summaries of criminal records of private citizens could not be publicly released, where the summaries had been compiled by the government and were not otherwise public. 489 U.S. at 765-66. The Court did not reach the question of whether disclosure violated an individual's privacy interest under the U.S. Constitution. *Id.* at 762 n.13. In *AFL-CIO*, the D.C. Circuit held that sensitive confidential

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859 (7th Cir. 2000) ("Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations designed to serve these purposes") (citing *Cal. Democratic Party* v *Jones*, 120 S. Ct. 2402, 2406-07 (2000)), *Toledo Area AFL-CIO Council* v. *Pizza*, 154 F.3d 307, 325 (6th Cir. 1998)).

information and documents describing the union's political strategy, provided in response to the Federal Election Commission ("FEC") during the course of an FEC investigation, pursuant to a compulsory process, should not be publicly disclosed. 333 F.3d at 170-71. The information at issue was not collected for purposes of submission to the government, was submitted pursuant to a government subpoena, and had not been otherwise publicly disclosed. *Id.* Such information included membership and volunteer lists and documents revealing the union's political goals, strategy, and tactics. Moreover, the court analyzed the case under the *NAACP* exception, and there was a showing that revealing the information at issue would cause a reasonable probability of harm to the AFL-CIO. *Id.* at 176-77. As discussed above, that issue is not before the Court.

Petitioners also heavily rely on *Campaign for Family Farms* v. *Glickman*, 200 F.3d 1180 (8th Cir. 2000), but in that case, the Eighth Circuit reached only the question of whether the *specific* petition before it should be exempted from disclosure under a FOIA exemption. At issue was whether a petition submitted to the Department of Agriculture was covered by an exception to disclosure under FOIA, which exempts from disclosure files "which would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 1183 (quoting 5 U.S.C. § 552(b)(6)). In holding that the petition was covered by the exemption, the Eighth Circuit noted that the petition required an explicit statement

that the signer supported repeal of a mandatory program and thus the court held that the "strong interest in a secret ballot" required these petitions to be confidential. *Id.* at 1188. Because the court held that an exemption under FOIA applied, the court did not reach the question of whether disclosure violated the First Amendment. *Id.*

No such declaration appears in this case. The only language to which a citizen signing *these* petitions subscribes is the following:

> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. 71, filed to revoke a bill that would expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses, except that a domestic partnership is not a marriage, and was passed by the 61st legislature of the State of Washington at the last regular session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington.

> in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Blinn Decl. in Support of Opposition to Motion for Preliminary Injunction, Ex. A (Dkt. #27); *see also* WASH. REV. CODE § 29A.72.130 (WAFST App. 6a).[8]

Moreover, unlike the plaintiffs in *Glickman*, who invoked the statutory exception provided by FOIA, petitioners never attempted to invoke the protections offered under the Public Records Act. *Glickman* is irrelevant and inapplicable to the case at hand.

In sum, signing a referendum or initiative petition is a public act, and the very act of signing

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[8] Petitioners argue that because they added their own political characterization of the legislation at issue to the required content of the petitions, signers *must have* intended to thereby reveal their ultimate vote. Petitioners' Brief at 21 n.26, 13 But this argument is defeated by the very evidence to which petitioners cite: The petitions themselves plainly demonstrate the clear demarcation between (a) the political hyperbole at the top ("If same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal . . even over objections of parents Sign R-71 to protect children."), and (b) the much more limited and statutorily required statement to which the signatories subscribed. Blinn Decl in Support of Opposition to Motion for Preliminary Injunction, Ex. A (Dkt #27).

requires disclosure. The First Amendment does not require that petitions be secret.

2. There Is No Historical Record of Anonymity or Harassment with Respect to Referendum or Initiative Petitions

In *McIntyre*, the Court considered that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent," in rejecting Ohio's self-identification requirement. 514 U.S. at 357. The Court considered the historical practice of allowing anonymous pamphleteering in order to protect minority viewpoints from harassment. *Id.* No such history exists with respect to initiative and referendum petitions. Indeed, the historical record is to the contrary.

Approximately half of the states in the nation have initiative and/or referendum laws. *Ballot Integrity: A Broken System in Need of Solutions, a State by State Report Card*, Ballot Initiative Strategy Center, http://www.tinyurl.com/yktzoxf (last visited Mar. 23, 2010) (identifying 24 states, excluding the two states with popular referenda only). Of these, only one—California—exempts initiative and referendum petitions from public disclosure. Cal. Gov't Code §§ 6253.5, 6253.6. Nearly all remaining states provide the public with timely access to such petition sheets. *See* Ballot Integrity, *available at* http://tinyurl.com/yktzoxf (last visited Mar. 23, 2010).

In Washington, as the record below demonstrates, initiative and referendum petitions are subject to public disclosure under the Public Records Act and have been for decades. There is no history of secrecy with respect to initiative or referendum petitions since the passage of the Public Records Act. Indeed, in the decades since the statute was enacted (by citizen initiative), Washington has routinely disclosed petitions upon request and without controversy.

Of course, as petitioners note, *prior* to the adoption of the Public Records Act, Washington did not disclose initiative or referendum petitions. But, then, prior to the Public Records Act, Washington did not disclose a *wide variety of public records.* Indeed, changing that state policy was precisely the point of the statute. Nothing about Washington's history with respect to initiatives or referenda supports petitioners' effort to create a constitutional right precluding the release of those records that exists in neither Washington's constitution nor its statutory law. As Justice Scalia pointed out in his dissent in *McIntyre*, "to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right." 514 U.S. at 373.[9]

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[9] Petitioners argue that a 1973 statement by Washington Secretary of State A. Ludlow Kramer demonstrates that the reasoning of two Washington Attorney General Opinions issued before the passage of the Public Records Act, survived the passage of the Public Records Act. Petitioners' Brief at 9 n.18 (citing Wash. Op. Atty. Gen. 378 (1938) and Wash. Op.

Nor is there evidence in the record remotely suggesting a general threat of harassment for those signing initiative or referendum petitions, in Washington or elsewhere. Such petitions typically concern tax policy, revenue, budget, or other state law issues. *See, e.g.*, I-1033 (state, county, and city revenue), I-960 (state tax and fee increases), I-920 (state estate tax), I-912 (state gasoline tax), I-892 (scratch lottery tickets to reduce state property taxes), I-776 (state charges for automobile license tabs), I-747 (state property tax levies), I-722 (state tax and fee increases), I-695 (state tax increases), I-602 (state collections and expenditures), I-601 (state expenditures), I-559 (state property tax rate); Washington Secretary of State, Yearly Summary of Initiatives to the Legislature, Yearly Summary of Initiatives to the People, Yearly Summary of Referendum Measures, and Yearly Summary of

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Atty. Gen. 55-57 No. 274 (1956)). Petitioners further argue that this position was "confirmed by the state courts." *Id.* (citing *Neal* v. *Cheney* [sic], No. 48733 (Wash. Super. Ct. Thurston County, Sept. 14, 1973)). The court in that case, however, concluded that it did not have to reach the question of whether the petitions would be publicly disclosed as there was no member of the public before the court seeking disclosure. Order Enjoining Examination of Initiative 282 Petitions and Order of Dismissal, *Chaney* v. *Kramer*, No. 48733 (Wash. Super. Ct. Thurston County) (Sept 4, 1973). And, of course, the present Secretary of State *rejected* Secretary Kramer's view, and the present Attorney General supports that rejection Regardless, these state law issues are not properly before the Court and hardly demonstrate a federal *constitutional* right to secrecy in the initiative or referendum process

Referendum Bills, http://tinyurl.com/ yz736kk (last visited Mar. 23, 2010). Even those involving more controversial social policy issues such as the so-called "death with dignity" initiative (Initiative 1000), or those calling for deregulation of marijuana (Initiative 692), have proceeded to the ballot without incident (other than instances of signature-gathering fraud as noted above).

Indeed, the *only* alleged incidents of harassment proffered by petitioners involve two relatively recent initiatives, one in California and one in Washington, both relating to same-sex partnerships.[10] The only court to have considered the California evidence found it insufficient to limit campaign finance disclosure requirements. *ProtectMarriage.com* v. *Bowen*, 599 F. Supp. 2d 1197, 1226 (E.D. Cal. 2009). Washington's own Public Disclosure Commission reached the same conclusion. *Minutes of Public Disclosure Commission's Aug. 27, 2009 Meeting*, http://www.tinyurl.com/ ydp7jce (last visited Mar. 23, 2010) (rejecting PMW's request for an exemption from campaign finance disclosure requirements for Referendum 71 donors). Given that the incidents concerned a different measure, at a different election, hundreds of miles away, their significance is even more attenuated.

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[10] The amicus brief of Common Sense for Oregon, The Oregon Anti-Crime Alliance, and Oregonians in Action discusses two incidents of purported harassment, but the incidents are not only unsupported by evidence, they concern petition circulators, not petition signers.

But whatever else might be said of the limited record before the Court on this point, it does not demonstrate a frequent, consistent, or historical threat of harassment to those pursuing even controversial initiatives or referenda. The right of citizens to propose initiatives and referenda has existed in some states since the late 1800s, *see* Initiative & Referendum Inst., *The History of Initiative and Referendum in the United States*, http://tinyurl.com/yevfe3t (last visited Mar. 23, 2010), yet the record before the Court lacks *any* evidence that those signing such petitions have frequently (or, indeed, ever) been subject to harassment beyond the usual give and take of public debate over the long history of such petitions. On this point, petitioners' advocacy far outruns the evidence.

3. Initiative and Referendum Petitions Are Subject to Reasonable Time, Place, and Manner Regulation

Whether a state chooses to provide a right of its citizens to legislate through an initiative or referendum process is entirely a matter of state law. How a state chooses to structure that right—the particular filing, format, or qualification restrictions—are, similarly, subjects of state law and indeed subjects upon which the states differ significantly. *See generally* Ballot Integrity (detailing differences among state initiative and referenda laws), *available at* http://tinyurl.com/yktzoxf (last visited Mar. 23, 2010).

The states, moreover, retain broad power to regulate the time, place and manner of elections pursuant to article I, section 4 of the U.S. Constitution. "The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (citations omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). The Court has deferred to state regulation that imposes "'reasonable, nondiscriminatory restrictions'" upon voters' First and Fourteenth Amendment rights. *Id.* at 434 (quoting and citing *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983)). The broad grant of plenary power to the states over election procedures exists elsewhere in the U.S. Constitution as well, even where the election of the president is at stake. *See McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892) (holding that article II, § 1, cl. 2, grants states the "broadest power," to define the method" to appoint electors).

In *Burdick*, the Court upheld a state's complete ban on write-in ballots. 504 U.S. at 441-42; *see also*

Crawford v. *Marion County Election Bd.*, 553 U.S. 181 (2008) (upholding voter identification requirement for in-person voting); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding "antifusion" provision). Washington's choice here—to provide a referendum process that permits the public disclosure of the underlying petitions—falls easily within its power to define the referendum process and regulate the time, place, and manner of its exercise.

Indeed, in this sense, even assuming that petition signing is pure speech, petitions are analogous to state-created non-public fora and therefore subject to reasonable restrictions. *See, e.g., Ark. Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677-78 (1998); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). The Court has held that the government creates a non-public forum when it "allows selective access for individual speakers rather than general access for a class of speakers." *Forbes*, 523 U.S. at 679-80. Further, "permitting limited discourse" does not transform a non-public forum into a limited one. *United States* v. *Am. Library Ass'n*, 539 U.S. 194, 206 (2003) (internal quotation marks and citation omitted). Thus, the Court has held that a candidate debate on public-access television was a non-public forum. *Forbes*, 523 U.S. at 676. The Court has also held that Internet access in libraries is a non-public forum. *Am. Library Ass'n*, 539 U.S. at 206.

In fact, two of the courts of appeals have analyzed initiatives as non-public fora subject to reasonable regulation, including removing entire subjects from the initiative process. In *Marijuana Policy Project* v. *United States*, the D.C. Circuit rejected the plaintiff's argument that the initiative process was a public forum, holding that "[a]lthough places designated for the expression of views about legislation—the grounds of the U.S. Capitol, for example, share these characteristics, the legislative act itself, i.e., the voting that occurs inside the Capitol, does not." 304 F.3d 82, 86-87 (D.C. Cir. 2002) (citation omitted).

Similarly, the Tenth Circuit implicitly recognized the non-public forum nature of initiatives when it held that a subject matter could be removed from the initiative process, stating that a plaintiff "is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot." *Skrzypczak* v. *Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996), *overruled on other grounds by Initiative & Referendum Inst.* v. *Walker*, 450 F.3d 1082 (10th Cir. 2006).

A petition is a method under which the state allows qualified individuals selective access to the legislative process. In this way, signing a petition is analogous to the non-public fora at issue in *Forbes* (a candidate debate on public television) and

American Library Association (Internet access in public libraries), or a city council or legislative hearing offering public comment time but limiting the time to three minutes per speaker, or placing other content-neutral time, place, and manner regulations on the comment opportunity. In each case, the content-neutral regulation of the speech fits easily within the state's power to regulate the non-public forum.

Petitioners, of course, retain their right to speak, and even to speak anonymously, on the subjects at issue. There is no dispute that petitioners can distribute anonymous handbills, write anonymous letters to their legislatures, or meet in private with like-minded individuals to plan how to advocate a change in the law. Had petitioners done any of these things, the government could not compel them to include their identities as part of their speech. Instead, petitioners signed a petition for a referendum, in a state with a well-defined public policy of open government, a strong Public Records Act, and a well-established practice of disclosing referendum and initiative petitions.

4. Signing a Referendum Petition Is Not Pure Speech

Petitioners' primary argument for the application of strict scrutiny relies on the assumption that signing a referendum petition is "core political speech." This premise is incorrect.

Signing a referendum petition is an act with significant legal effect, wholly apart from whatever speech component it might contain. It not only suspends the operation of a lawfully enacted statute but commands the state to place the matter on the ballot at the next general election. As a result, it involves conduct of legal significance and, as the court of appeals recognized, is therefore subject to intermediate scrutiny pursuant to *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* Pet. App. 14a.

First, the language appearing on the petition sheets simply directs the Secretary of State to place the matter on the next general election ballot. WASH. REV. CODE § 29A.72.130 (proscribing language to appear on petitions for referenda, including "We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that [this] Referendum . . . shall be referred to the people of the State for their approval or rejection") (WAFST App. 6a). It does not articulate a position with respect to the underlying legislation, and, as a result, citizens signing the petition are not necessarily voicing disagreement with that legislation. But even if construed as "speech" opposing the statute at issue, that speech is incidental to the intended legal significance of the act of signing, as courts of appeals have held.

In *Wirzburger* v. *Galvin*, 412 F.3d 271 (1st Cir. 2005), the First Circuit upheld a subject-matter exclusion from the state initiative process. The

court distinguished between "the communicative aspect of the political process" (where strict scrutiny applied) and the reasonable regulation of the act of creating legislation through initiative or referendum (where intermediate scrutiny applied). *Id.* at 277. "The primary goal of state initiative procedures is to create an avenue of direct democracy whereby citizens can participate in the generation of legislation—that is, the *act* of creating law." *Id.*

Similarly, in *Marijuana Policy Project*, the D.C. Circuit held that Congress's act of stripping away the District of Columbia's power to legislate the legality of marijuana through initiative did not violate the First Amendment, stating that it was aware of no case "establishing that limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment. This is not surprising, for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." 304 F.3d at 85.

Petitioners nevertheless maintain that petition-signing constitutes pure speech. Effectively ignoring the Court's decision in *O'Brien*, they simply argue that what is at issue is "the petition-signing *discussion*." Petitioners' Brief at 40 (emphasis added) (citing to *Buckley II*, 525 U.S. at 186). This assertion fails to confront the issue. Beyond a doubt the *discussion* between the signature-gatherer and a citizen who signs the

petition is protected speech, but Washington does not even purport to regulate *the discussion*. Both the signature-gatherer and the citizen signing the petition remain entirely free to engage in whatever discussion they would like and nothing about the Public Records Act affects, controls or reveals that discussion. The law applies only as a result of the *act* of signing a petition that is intended to be a government record with legal effect. The public release of the petition sheets thus at most implicates mixed conduct and speech.

Despite these distinctions, only one of the amicus briefs filed in support of petitioners even cites *O'Brien*. The amicus brief submitted by the Justice and Freedom Fund attempts to distinguish *O'Brien* by arguing that "the 'act' of signing a petition is more like writing a news article, book, or other communication that clearly constitutes protected speech than expressive conduct." Brief of Justice and Freedom Fund as *Amicus Curiae* Supporting Petitioners at 6. Although a book or newspaper article is undoubtedly protected speech, signing a petition is different: it has legal effect, and its significance is assuredly *not* dependant on its persuasiveness.

The Fund's brief also analogizes signing an initiative petition to the right to petition the government for redress of grievances. But there is a qualitative difference between a petition for redress that is essentially a *plea* to the government to change course (similar to the petitions for

redress referenced in the Declaration of Independence) and the use of a state-created legal mechanism by which the people can command change if there are sufficient signatures. The former (having no legal effect) is only speech; the latter (causing delay in legislation and the consequent legal rights that were to flow from it pending a vote of the people) is something *more*. In the former citizens can decide whether to make their identities part of their communication; in the latter their validated identities as legal voters is the necessary component of their participation. Because signing a petition involves conduct, the court should, at most, apply intermediate scrutiny.

5. The Public Records Act Is a Reasonable and Content-Neutral Time, Place, and Manner Regulation

Petitioners next attempt to avoid application of intermediate scrutiny with the surprising contention that the Public Records Act is not viewpoint neutral as applied to the disclosure of petitions. Petitioners' Brief at 41-42. This argument is easily dispatched. First, it was not made below or in the Petition and thus is not properly before this Court. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Cooper Indus., Inc.* v. *Aviall Servs. Inc.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below.") (internal quotation marks and citation omitted).

But even if considered on the merits, the argument fails. Petitioners assert that the Public Records Act is not viewpoint neutral "as applied to the release of referendum petitions" because only those seeking to overturn a legislative act would have submitted such petitions to the Secretary of State. Petitioners' Brief at 41-42. But the Public Records Act *also* requires disclosure of any public records that identify *proponents* of any piece of legislation. It is assuredly content neutral: all public records are required to be disclosed, regardless of their label, content, or purpose.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).

It would be difficult to find a more neutral statute with universal applicability than Washington's Public Records Act. The Public Records Act is a law of broad application to *all* public records. *See, e.g., In re Dependency of KB*, 210 P.3d 330, 333 (Wash. Ct. App. 2009) ("The [Public Records Act] requires that each agency make all public records available for public inspection and copying.") (internal quotation marks and citation omitted); *Kitsap County* v. *Smith*, 180 P.3d 834, 844 n.21 (Wash. Ct. App. 2008) ("[T]he primary purpose of the Public Records Act is to

ensure an open and honest government and, to that end, allow the public access to all public records unless those records fall under an exception to the act.") (citing WASH. REV. CODE § 42.56.030). It does not favor any one viewpoint over another and broadly applies to all governmental records. If anything, it was designed to allow those who are skeptical of government to obtain public records about governmental action.

Moreover, absent public disclosure, referendum proponents in fact gain an *advantage* in the public debate. Sponsors of a referendum have unfettered access to the signed petitions both before and after they turn those petitions in to the Secretary of State. Petitioners do not represent that they did not copy the petition sheets or create a database listing those who signed so that they could subsequently direct campaign mail to them. *See* Petitioners' Brief at 36. At the same time, petitioners seek to prevent others from having access to this same information.

Petitioners also assert that the "Public Records Act's apparent facial content neutrality is undermined" by the fact that there are numerous statutory exemptions from the Act. *Id.* at 42. Petitioners do not argue, however, that those exemptions themselves are content-based. Rather, they appear to be arguing that the existence of statutory exemptions, without more, will render a records-related statute content-based. *Id.* Certainly petitioners presented no evidence that

the State has applied the Public Records Act to petitions on the basis of whether any particular document favors one side or the other of any particular political debate. If anything, the record confirms the opposite, given the declared and consistent policy of the State to disclose all initiative and referendum petitions, as well as the heavy consequences imposed by the Public Records Act upon the State for failing to produce public records. *See* WASH. REV. CODE § 42.56.550(4); *see also Yousoufian* v. *Office of Ron Sims*, 98 P.3d 463, 471 (Wash. 2004) (concluding that court has no discretion to reduce penalty period for failure to disclose public records).

6. The Right of Association Is Irrelevant

Petitioners next argue that strict scrutiny should apply because disclosure violates their "privacy" of "association." Petitioners' Brief at 24. This argument assumes that those who signed the Referendum 71 petition have necessarily associated themselves with other signers. Citizens who sign a referendum petition do not form a private association, however, and the disclosure of their names does not warrant application of strict scrutiny under *NAACP* v. *Alabama* and *Brown* v. *Socialist Workers '74 Campaign Committee*.

First, and perhaps most obviously, those who sign referendum petitions are not "associating" in the constitutional sense; they are simply signing a petition. They may know of other signers because they signed in a group or they read the names of

those who had signed before them. That is hardly a confidential association. Petitioners cannot sustain their suggestion that disclosure of these petitions would reveal an "association" that was never organized or mentioned to (much less subscribed to) its very members. Indeed, at this level of generality, virtually *any* public disclosure would reveal an "association" of citizens. But no court has ever recognized such a sweeping and ambiguous associational right limiting a state's power to require public disclosure of government records.

The record in this case is markedly different from that before the Court in *NAACP*. The NAACP was "a nonprofit membership corporation organized under the law of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name, and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner." *NAACP*, 357 U.S. at 451-52 (footnote omitted). Likewise, the Socialist Workers '74 Campaign Committee was "a small political party with approximately sixty members in the State of Ohio" with a constitution governing its activities and "members [who] regularly run for public office." *Brown*, 459 U.S. at 88. In both cases, membership was not publicly disclosed.

The right of association is, in short, irrelevant to this case, and the Court should reject petitioners'

attempt to liken all signers to a private association protected by the First Amendment.

B. Disclosure of Petitions Under the Public Records Act Serves Important Interests

For these reasons, the court of appeals correctly applied intermediate scrutiny to the question of whether petitions can be publicly disclosed. Under intermediate scrutiny, disclosure of petitions under the Public Records Act does not violate the First Amendment if it furthers an important governmental interest unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than necessary to justify the interest. *See O'Brien*, 391 U.S. at 377. Here, public disclosure of petitions serves both important anti-fraud and informational interests, and any effect on speech is incidental.[11]

1. Public Disclosure Serves to Detect and Deter Fraud

The detection and deterrence of electoral fraud is a compelling governmental interest. This Court has consistently recognized the vital role public disclosure plays to safeguard the political process and has upheld laws restricting speech when faced with anti-fraud interests. In this case, petitioners advance the startling suggestion that fraud in the petition process is not a danger and that preventing such fraud is not a legitimate state interest.

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[11] These interests are so important and so well served by disclosure that any higher level of scrutiny is also satisfied.

History, and this Court's jurisprudence, teaches otherwise. In Washington and elsewhere throughout the nation, signature-gathering fraud is a distressingly and increasingly common threat to the initiative and referendum process, and the public, rather than governmental agencies alone, plays an important role in combating fraud.

In *Burson*, 504 U.S. 191, for example, the Court held that the government's interest in preventing fraud in the election process is so compelling that it justified restrictions on pure political speech where strict scrutiny applied. *Id.* at 211. The Court upheld a Tennessee law that prohibited the display of campaign materials and solicitation of votes within 100 feet of the entrance of polling places. *Id.* Recognizing that strict scrutiny applied because the law restricted political speech, the Court nevertheless held that the state's interest in preserving the integrity of the election process and preventing undue influence on voters was sufficiently compelling. *Id.* at 198-200.

Likewise, the Court has consistently acknowledged the compelling anti-fraud interest served by public disclosure of campaign contributions. In *Buckley I*, the Court upheld contribution disclosure provisions of the Federal Election Campaign Act of 1971 because such disclosure requirements were the least restrictive means of "curbing the evils of campaign ignorance and corruption." 424 U.S. at 68. The Court wrote,

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Id. at 67 (internal quotations and citation omitted); *see also Citizens United* v. *Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (upholding disclosure and disclaimer requirements); *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 196 (2003), *overruled in non-relevant part on other grounds by Citizens United*, 130 S. Ct. 876 (2010) (upholding disclosure requirements based on the state's interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof and gathering the data necessary to enforce more substantive electioneering restrictions"); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance.") (alteration in original) (citation omitted).

This anti-fraud interest is no less compelling in the context of initiative and referendum signature-gathering. Signature-gathering fraud in connection with initiative and referendum petitions is an increasingly common issue and one that the states have struggled to control. As with political

contributions, public disclosure of initiative and referendum petitions plays a crucial role in protecting this very public legislative process.

Signature-gathering fraud has occurred throughout the nation, with reported cases just in the last ten years from not only Washington, but also Arizona, Colorado, the District of Columbia, Maine, Michigan, Nebraska, Ohio, Oklahoma, and Oregon (*see supra* at 8-11). The states, including Washington, have ample reason to be alarmed at this activity, and the use of public disclosure to combat it serves compelling state interests.

The government acting without public scrutiny cannot prevent or discover signature-gathering fraud entirely. For example, in Washington, the State generally checks only 3 to 5% of signatures and cannot catch fraud that might easily be noticed by the public—either citizens checking to make sure their own names do or do not appear on a petition or by an organization motivated to ensure that a referendum campaign is acting legally.[12]

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[12] In Washington, state law authorizes a party to challenge the certification of an initiative or referendum for the ballot. WASH REV. CODE § 29A 72.240 (Pet. App. 50a). This important statutory safeguard is largely toothless without access to the petitions themselves to check for fraud. Petitioners themselves only barely surpassed the minimum number of signatures needed, and WAFST had concerns about PMW's campaign, yet was hindered by the restraining order from using the petitions to check for fraud or otherwise ineligible signers. *See* Order Amending and Extending the Court's TRO (Dkt. #59). Although WAFST was eventually

Initiative and Referenda Signature Checks: A Historical Perspective, Washington Secretary of State, http://tinyurl.com/ydfxglp (last visited Mar. 24, 2010).

There are other areas in the election process where public disclosure regularly detects fraud. Absentee ballot envelopes, poll books, registration lists, voting history records, polling place reconciliation records, and a wide variety of similar election records are routinely made public during an election, recount, or election contest litigation. These records can be and routinely are used to determine whether citizens voted more than once or unqualified citizens voted. If disclosing petitions violates the First Amendment, then what about these records?

Indeed, these very records were used in 2004 by both the presumptively-elected Washington Governor and the defeated candidate to demonstrate that illegal votes had been cast in the election by convicted felons, individuals who voted twice, and individuals who voted absentee ballots on behalf of deceased spouses. *Borders* v. *King County*, Case No. 05-2-00027-3, Final Judgment Dismissing Election Contest with Prejudice and Confirming Certification of Election of Christine

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provided with copies of the petitions, as an exception to the TRO entered by the trial court, WAFST could not publicly disclose the names of signatories to verify that they had actually signed because of a confidentiality order. Moreover, the petitions were in a form that could not be correlated to the work done by WAFST observers.

Gregoire, Chelan County Super. Ct. (June 24, 2005). The public was heavily involved on both sides, with those supporting the defeated gubernatorial candidate posting online a variety of election-related records in an effort to use public scrutiny to identify voter fraud (comparing voting history records with conviction or death records available elsewhere). *See Sound Politics Voter Database*, http://tinyurl.com/yhhygof (archived page of database of voters who voted in Washington's 2004 gubernatorial election, posted in February 2005) (last visited Mar. 23, 2010).

Disclosure also serves governmental interests by providing information that promotes the "[p]reservation of the individual citizen's confidence in government." *Bellotti*, 435 U.S. at 788-89. Public disclosure serves this interest by providing additional oversight for government action, *id.* at 792 n.32, exactly the goal of the Public Records Act. With petitions, public disclosure promotes confidence in government by ensuring that the government has fairly and accurately counted the signatures, that only registered voters have signed the petitions, and that signature-gathering fraud has not infected the signature-gathering process.

Owing to limited time and government resources, public disclosure is plainly an important method for detecting fraud in the initiative and referendum process. As the Court has previously acknowledged, "voter intimidation and election fraud are successful precisely because they are

difficult to detect." *Burson*, 504 U.S. at 208.[13] Public disclosure addresses this problem by allowing the public to verify the legitimacy of petition signatures. Washington's choice to allow sunlight into this process—a choice embraced by nearly every other state with initiative or referendum processes—is narrowly tailored to address the compelling anti-fraud interest.

2. Public Disclosure Serves Informational Interests

In addition, public disclosure of referendum petitions serves important informational interests in an informed and confident electorate. Just this term, in *Citizens United*, the Court recognized that public disclosure laws help citizens "make informed choices in the political marketplace." 130 S. Ct. at 914, 915-16 (internal quotation marks and citation omitted) (holding that the "informational interest alone" was sufficient to uphold the application of disclosure and disclaimer provisions to corporate advertising). This interest was also recognized in *Bellotti*, where the Court held that the government has an interest in notifying the electorate about the

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[13] Deterring fraud in referenda is particularly important because referenda delay implementation of a law duly enacted by the legislature. This delay can cause real and material harm. In *Wynand* v. *Department of Labor & Industries*, 153 P.2d 302 (Wash. 1944), the Washington Supreme Court held that an injured worker was properly denied benefits that he would have otherwise obtained if a referendum measure had not delayed implementation of new legislation until after the date of the worker's injury.

source of political communications so the voters can make informed choices. 435 U.S. at 793 n.32.

The public release of petition signatures serves this informational purpose. Although signing is not necessarily the same as opposing the underlying legislation, information about who signed can provide insight into whether support for holding a vote comes predominantly from particular interest groups, political or religious organizations, or other group of citizens. *See Buckley II*, 525 U.S. at 202 (holding disclosure of initiative sponsors and amount spent gathering support for their initiatives serves important check on "domination of initiative process by affluent special interest groups"). Such information will also allow those considering whether to sign to discuss the issue with those who have already signed. *See, e.g.*, *McConnell*, 540 U.S. at 197 (upholding disclosure provisions on the ground that they would help citizens "make informed choices in the political marketplace") (internal quotations and citation omitted).

3. The Potential Effect of Public Disclosure on Petition Signing Is Incidental

Against these compelling government interests in disclosure, petitioners argue that disclosure "chills" citizens from signing initiative or referendum petitions. *E.g.*, Petitioners' Brief at 8 n.17, 29, 52. But the argument is unsupported by the record before the Court and certainly does not

rise to the level of long historical experience necessary to support a facial challenge that would require all petitions to be kept confidential as a matter of federal constitutional law. Isolated incidents of rude or boorish behavior over a particular subject, even if perceived as threatening, do not justify a sweeping constitutional bar to the routine application of public records disclosure statutes to initiative, referendum and other governmental petitions by states around the country.

The record before this Court is lacking significant evidence to support Petitioners' sweeping "Count I" of their lawsuit, that challenges the application of the Public Records Act to *any* referendum or initiative petitions. There are no allegations in the complaint that *any* citizens refused to sign the Referendum 71 petition—or any other petition for that matter—for fear of harassment. Nor do the three "John Doe" declarations filed in support of the motion for preliminary injunction assert that the declarants were aware of anyone refusing to sign the petition for fear of harassment. This remarkable silence is telling, particularly because, as petitioners point out, Referendum 71 petitions were circulating in Washington shortly after Proposition 8 in California, and petitioners contend supporters of Proposition 8 were harassed.[14]

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[14] Curiously, even the information petitioners submit regarding events in California during the Proposition 8

Indeed, the record here stands in stark contrast to the evidence before the Court in *Buckley II*, which struck down a state law requiring petition circulators to wear name tags. In *Buckley II*, the plaintiff submitted testimony by individuals stating that they would not circulate petitions if forced to identify themselves. 525 U.S. at 197-98.[15]

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campaign fails to demonstrate that anyone actually refused to sign Proposition 8 because of fear of harassment

[15] The information petitioners present regarding events during the campaigns for California's Proposition 8 and Washington's Referendum 71 largely amounts to evidence of heated debate. One John Doe declaration recounts a "calm" phone call where the caller suggested that she might picket the declarant's church. John Doe Decl. #3 in Support of Motion for Preliminary Injunction ¶ 3 (Dkt. # 52 at 1). Such behavior would be rude and obnoxious, to be sure, but hardly constitutes illegal harassment or a threat. Another John Doe declaration describes certain non-violent and relatively civil confrontations in public while actively collecting signatures for Referendum 71. John Doe Decl. #4 in Support of Motion for Preliminary Injunction ¶¶ 10-17 (Dkt #53 at 2-3) The third John Doe declaration describes phone calls with a specific person who indicated plans to picket the declarant's church, where she is a pastor. John Doe Decl #5 in Support of Motion for Preliminary Injunction ¶¶ 2, 17, 20 (Dkt. #54 at 1-4). Again, while such behavior might be annoying or rude, it is not threatening. The bulk of petitioners' remaining evidence includes emails to the campaign manager of Referendum 71, a public figure broadly identified with the campaign, not an individual signer. Even then, with the exception of one or two emails highlighted by petitioners, most of the emails reflect a civil attempt to convince the campaign manager that his viewpoint is wrong. Compl (Dkt. #2).

Impolitic, argumentative, and even threatening statements are not uncommon in political campaigns.[16] That may be cause for political parties, candidates, and initiative sponsors to take responsible action to control their supporters; it might be reason for individual citizens to encourage moderate political discourse and condemn those engaged in incendiary rhetoric; and, at the extreme, it might be cause for law enforcement activity. But it hardly justifies the rejection of state public disclosure policies as applied to initiative and referendum petitions.

Heated debate lies at the core of our democracy and the constitutional provision that petitioners invoke. The Court has refused efforts to ban speech because some viewers or listeners may find it

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[16] The problem, as one might expect, cuts both ways. Those opposing the effort to qualify Referendum 71 for the ballot, including members of WAFST, received angry telephone and email messages and were the subject of hostile, threatening, and harassing blog and internet postings. Levinson Decl. in Opposition to Motion for Temporary Restraining Order, Exs. E-G, filed in *Family Pac.* v. *Reed*, No. 09-5662 (W.D. Wash. Oct. 21, 2009) (Dkt. #26). This, of course, is almost *always* the case where citizens or their representatives vigorously debate important public policy issues about which they hold passionate views. Where zealous advocacy crosses the line to credible threat or actionable harassment, then law enforcement can and should police such behavior. Short of that, it is most assuredly not the role of the federal courts to intervene in such vigorous political debate and wield the Constitution to overturn state public records policies in a misguided effort to introduce civility into our public discourse.

offensive. *See, e.g.*, *Virginia* v. *Black*, 538 U.S. 343 (2003) (reversing conviction for cross burning that was based on statutory presumption of intent to intimidate); *Miller* v. *California*, 413 U.S. 15 (1973) (defining standard between obscenity and non-obscene pornography). The Court has nearly always embraced the principle that more speech, not less, is favored, and thus, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007). It is not for this or any other court to decide what is "good" speech or "bad," because it is only in the crucible of public debate that the marketplace can reliably discern fact from fiction. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.") (Holmes, J., dissenting).

Passionate, rude, or even hostile speech relating to a single referendum in one state is not cause for this Court or any court to overturn reasonable state regulation of the initiative and

referendum process designed to further important government interests.

CONCLUSION

For the reasons set forth above, Washington Families Standing Together respectfully requests that the Court affirm the court of appeals.

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March 25, 2010

RESPONDENT'S BRIEF

NO. 09-559

IN THE SUPREME COURT OF
THE UNITED STATES

JOHN DOE #1, JOHN DOE #2, AND
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, SECRETARY OF STATE OF WASHINGTON,
AND BRENDA GALARAZA, IN HER OFFICIAL CAPACITY
AS PUBLIC RECORDS OFFICER FOR THE SECRETARY
OF STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT SAM REED

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QUESTION PRESENTED

The Public Records Act requires government to make public records available for citizens to inspect. Public records are writings about the conduct of government, and include referendum petitions voters sign to qualify a measure for the ballot. Does the Public Records Act violate petition signers' First Amendment right to anonymous speech by allowing inspection of referendum petitions upon which signers have publicly disclosed their names and addresses to referendum sponsors, signature gatherers, members of the public, and government?

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STATEMENT

This is a facial challenge to Washington's Public Records Act (PRA). The PRA requires state and local government to make public records available for inspection and copying at the request of members of the public. Initiative and referendum petitions signed by voters to direct that an election be held on whether to adopt or revoke a law are public records subject to the PRA. Petitioners claim that the disclosure of any initiative or referendum petition, on any subject, violates the petition signer's First Amendment right to anonymous speech. The court of appeals correctly rejected this argument, holding that the PRA satisfies intermediate scrutiny because of the State's substantial interests in transparency and accountability in government, and providing information to the voters. The court of appeals should be affirmed.

A. Washington's Public Records Act

The PRA was enacted by the people in 1972, through Initiative Measure No. 276. 1973 Wash. Sess. Laws page nos. 1-31. The PRA declares that the "people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030 (2009). Accordingly, the "people insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.*

The PRA defines a "public record" as "any writing containing information relating to the

conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency[.]" Wash. Rev. Code § 42.56.010(2) (2009). Agencies are required to "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070 (2009). Statutory exemptions from disclosure are narrowly construed. Wash. Rev. Code § 42.56.030 (2009). Washington courts consistently refer to the PRA as a "strongly-worded mandate for open government, requiring broad disclosure[.]" *E.g., Rental Housing Ass'n of Puget Sound v. City of Des Moines,* 199 P.3d 393, 394 (Wash. 2009).

B. Washington's Referendum Process

State laws are enacted either by the state legislature, or directly by the people through the use of the initiative and referendum powers. Wash. Const. art. II, § 1. A referendum "may be ordered on any act, bill, law, or any part thereof passed by the legislature" when the legislature refers a bill to the people or when the people file a petition with the requisite number of signatures.[1] Wash. Const. art. II, § 1(b). If the constitutional prerequisites for a referendum are met, the electorate votes on whether to accept or reject the bill passed by the legislature. *Id.*

When the legislature passes a bill that may be subject to referendum, the bill cannot take effect

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[1] There are some exceptions to the referendum power, but none of the exceptions are at issue in this case.

until ninety days after the legislative session is adjourned, during which time the people may trigger a referendum by filing petitions containing the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of a referendum. Wash. Const. art. II, § 1(b), (c). The referendum "petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote." Wash. Rev. Code § 29A.72.130 (2009). The referendum petition sheets signed by the voters must state:

> "To the Honorable . . . . . ., Secretary of State of the State of Washington:
>
> "We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. . . . ., filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . . day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." *Id.* (ellipses in original).

The petition sheets must warn that: "Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both." Wash. Rev. Code § 29A.72.140 (2009). Each petition sheet on which signatures are gathered "must consist of not more than one sheet with numbered lines for not more than twenty signatures[.]" Wash. Rev. Code § 29A.72.100 (2009).

Referendum signature petitions are filed with the Secretary of State (Secretary). The Secretary may refuse to file an initiative or referendum petition if the petition (1) does not contain the information required, (2) the petition clearly bears insufficient signatures, or (3) the time within which the petition may be filed has expired. Wash. Rev. Code § 29A.72.170(1)-(3) (2009). If the Secretary refuses to file the petition, he "shall endorse on the petition the word 'submitted' and the date, and retain the petition pending appeal." Wash. Rev. Code § 29A.72.170 (2009). "If no appeal is taken from the refusal of the secretary . . . to file a petition within the time prescribed, or if an appeal is taken and the secretary . . . is not required to file the petition by the mandate of either the superior or the supreme court, the secretary of state shall destroy it." Wash. Rev. Code § 29A.72.200 (2009).

If the Secretary accepts the petitions for filing, he must "verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by

persons representing the advocates and opponents of the proposed measure[.]" Wash. Rev. Code § 29A.72.230 (2009). The Secretary "may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process." *Id.* During the verification process, observers are prohibited from making a record of the information on the petitions, except upon court order. *Id.*

Anyone "dissatisfied" with the Secretary's decision that a referendum has or has not been signed by an adequate number of legal voters to qualify for the ballot may bring an action in superior court challenging the Secretary's decision. Wash. Rev. Code § 29A.72.240 (2009). Within five days of the superior court's decision, parties may seek review in the Washington Supreme Court. *Id.*

A referendum petition with sufficient signatures has two operative legal effects. First, the Secretary is required to conduct an election with regard to the measure. Second, operation of the law subject to referendum is suspended until it is approved by the voters. Wash. Const. art. II, § 1(d). Absent a referendum, a law goes into effect ninety days after the adjournment of the legislative session in which it was adopted. Wash. Const. art. II, § 41.

Since referendum signature petitions filed with the Secretary are "writing[s] containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency," they are public records under

the PRA. Wash. Rev. Code § 42.56.010(2). None of the statutory exemptions from public disclosure apply to referendum petitions. Prior to this litigation, the Secretary has routinely disclosed petitions in response to public records requests. J.A. 26.

Prior to the adoption of the PRA, the Attorney General advised that names on initiative and referendum petitions were not public records because "[w]hile there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege." 55-57 Op. Att'y Gen. 274 (Wash. 1956); Pet. 64a-65a. Since the adoption of the PRA in 1972, there is a specific statute that requires disclosure.

C. Referendum 71

In 2007, the Washington Legislature created state registered domestic partnerships. 2007 Wash. Sess. Laws page nos. 616-37. A domestic partnership may be formed when "(a) both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older." Wash. Rev. Code § 26.60.030(6) (2009). In 2009, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights, responsibilities, and obligations accorded state registered same-sex and senior domestic partners. 2009 Wash. Sess. Laws page nos. 3065-3141. The legislature adjourned on April 26, 2009. *Id.* at i.

E2SSB 5688 would have gone into effect ninety days later on July 25, 2009.

In May 2009, Petitioner Protect Marriage Washington began gathering petition signatures for a referendum election on E2SSB 5688. Signature gathering took place in public places, such as outside Wal-Mart and Target stores. Dkt. 53, Decl. John Doe No. 4, p. 2; Dkt. 54, Decl. John Doe No. 5, p. 2. The signature gatherers set up tables and asked members of the public walking by to sign the petition sheets. There may also have been interaction among members of the public about whether the petitions should be signed. *Id.* The Referendum 71 petition sheets were eleven inches by seventeen inches and each contained twenty lines for signatures. J.A. 31. Nothing shielded the names and signatures on the petition sheets, which were readily visible to other people who signed or read the petition.

On July 25, 2009, the proponents of Referendum 71 filed their signature petitions to the Secretary in an open, public forum. Referendum supporters and opponents were in attendance, as were several members of the news media. The petition sheets were counted and the Secretary's Office accepted the petitions for filing, and began the task of verifying the signatures. J.A. 24-25. The Secretary subsequently concluded that Referendum 71 had about 122,000 valid signatures, which were enough to qualify the measure for the ballot.

Washington Families Standing Together (WAFST) opposed Referendum 71, and brought an action against the Secretary, separate from this case, under Wash. Rev. Code § 29A.72.240 (2009) to

prevent the Secretary from certifying the measure to the ballot. To facilitate its challenge, WAFST filed a public records request to obtain the Referendum 71 petitions so it could review them for legal errors made by the Secretary related to the form and authentication of petitions and the acceptance of certain signers as registered voters. J.A. 34-35. The Secretary also received public records requests for the petitions from other citizens, including Toby Nixon on behalf of the Washington Coalition for Open Government (WCOG). J.A. 25.

During the signature-gathering process, the organization WhoSigned.org announced that it would file a public records request to obtain the Referendum 71 petitions and post the information from the petitions on the internet.

D. Proceedings In The District Court

On July 28, 2009, John Doe Nos. 1 and 2 and Protect Marriage Washington (Sponsors) filed this action in Federal District Court. The Sponsors alleged that the PRA violated their First Amendment rights, sought a declaration that the PRA was unconstitutional, and asked for a permanent injunction. The Sponsors advanced two claims. First, in Count I, the Sponsors asserted that releasing completed signature petitions for any referendum would violate the signers' First Amendment rights. J.A. 16. Count I was not specific to Referendum 71. Second, in Count II, the Sponsors asserted that releasing Referendum 71 petitions under the PRA would violate the petition signers' First Amendment right of association because disclosure would subject them to harassment. J.A.

17. The Sponsors did not allege that referendum petitions are not public records, as defined by the PRA, or that the petitions are statutorily exempt from disclosure. The Sponsors also did not allege that any part of Washington's laws governing the referendum process violates the United States Constitution.

The district court entered a temporary restraining order and established a briefing schedule for the Sponsors' motion for a preliminary injunction. Subsequently, WAFST and WCOG moved to intervene in the case. WAFST argued that the temporary restraining order prevented it from examining the Referendum 71 petitions to pursue its action against the Secretary to prevent the certification of the measure. J.A. 34-35. The district court granted both motions to intervene (J.A. 37) and amended the temporary restraining order to grant WAFST access to the petitions for the purpose of pursuing its action under Wash. Rev. Code § 29A.72.240. J.A. 35.

On September 10, 2009, the district court granted the Sponsors' motion for a preliminary injunction based on Count I of the complaint. The district court first considered the Sponsors' likelihood of prevailing on the merits of that Count. According to the district court, the Sponsors "assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. The *type of free speech in question is anonymous political speech*." Pet. 33a (emphasis added). The district court stated that "[t]he Supreme Court has consistently held that a component of the First

Amendment is the right to anonymously participate in a political process." Pet. 34a-34b (citing *Buckley v. Am. Constitutional Law Found., Inc.* (*Buckley II*), 525 U.S. 182, 200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Talley v. State of California*, 326 U.S. 60, 65 (1960)). The district court found that the Sponsors "have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." Pet. 38a. Based on this conclusion, the district court held that the PRA was subject to strict scrutiny, and that it was not narrowly tailored. According to the district court: "In light of the State's own verification process and the State's own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as an important check on the integrity of the referendum election process." Pet. 42a (internal quotation marks omitted). The district court also rejected the State's interest in informing the public of the names of the persons who supported the referendum because no one knows "whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public." Pet. 42a. Thus, for the district court, "the identity of the person who supports the referral of a referendum is irrelevant to the voter[.]" Pet. 42a-43a.

The district court's conclusion that the Sponsors were likely to prevail on the merits effectively determined its ruling on the Sponsors'

motion for a preliminary injunction. The district court held that "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction[.]" Pet. 43a-44a (internal quotation marks omitted). The district court also concluded that "[b]ecause this Court finds that [Sponsors] have established that this case likely raises serious First Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury . . . this court also finds that the equities tip in favor of the [Sponsors]." Pet. 44a-45a.

Although the district court's order did not directly set out the scope of the injunction, the court granted the injunction based on the Sponsors' Count I claim. In their motion, the Sponsors requested an injunction to enjoin Defendants from making referendum petitions available to the public pursuant to the PRA. J.A. 21. Thus, the preliminary injunction was not limited to Referendum 71 petitions. The district court did not rule on Count II, the Sponsors' claim that, as applied to Referendum 71, the PRA violates the First Amendment. Pet. 43a.

E. Proceedings In The Court Of Appeals

The Secretary immediately appealed the preliminary injunction and filed an emergency motion seeking a stay of the preliminary injunction and expedited review so the appeal could be resolved before the November 3, 2009, election on Referendum 71. The Ninth Circuit granted the motion for expedited review and, on October 15, 2009, the day after oral argument, issued an order reversing the district court, and stating that an "opinion setting forth the reasons for the court's

reversal of the Preliminary Injunction Order shall be issued expeditiously[.]" Pet. 2a-3a. The Ninth Circuit also ordered that the Secretary's "motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals."[2] Pet. 2a.

On October 16, 2009, the Sponsors filed an application with Justice Kennedy to vacate the Ninth Circuit's stay of the preliminary injunction. Following Justice Kennedy's referral of the application, the Court issued an order that the district court's preliminary injunction "shall remain in effect pending the timely filing and disposition of a petition for a writ of certiorari." Pet. 21a. "Justice Stevens would deny the application." *Id.*

On October 22, 2009, the court of appeals issued its opinion. Pet. 3a. The court of appeals assumed that "the act of signing a referendum petition is speech, such that the First Amendment is implicated." Pet. 11a. "Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the PRA to strict scrutiny." Pet. 12a.

The court of appeals held that "the district court's analysis was based on the faulty premise that

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[2] The Secretary did not release the Referendum 71 petitions after the Ninth Circuit's Order on October 15, 2009, because a state court had also issued a preliminary injunction prohibiting release of the Referendum 71 petitions. *Eyman v. Reed*, No. 09-2-02447-0 (Thurston Cy. Wash. Oct. 14, 2009). The state court action is stayed pending the outcome of this case.

the PRA regulates anonymous political speech." Pet. 12a. The Ninth Circuit rejected the district court's conclusion that signing a referendum petition is anonymous political speech. "First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." *Id.* Moreover, "each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers." *Id.* In addition, as the court of appeals observed, "any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise." *Id.* "In fact, the PRA provides to the contrary." *Id.* Finally, the Ninth Circuit observed that "Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process." *Id.* Accordingly, the court of appeals concluded that "the district court's application of anonymous speech cases requiring strict scrutiny was error." Pet. 13a.

The Ninth Circuit next rejected the district court's reliance on *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988), and *Buckley II*, 525 U.S. at 197, for the proposition that "any regulation of protected political speech is subject to strict scrutiny." Pet. 13a. According to the court of appeals: "This suggestion is unsupported by the applicable case law" because "it does not follow that a regulation that burdens

[protected] speech is necessarily subject to strict scrutiny." Pet. 13a. In this respect, the court of appeals referred to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994), where this Court applied intermediate scrutiny to viewpoint- and content-neutral provisions of federal law that required cable television operators to carry local broadcast stations on cable systems. The court of appeals also pointed to *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), where this Court applied a balancing test, rather than strict scrutiny, to an election law that burdened First Amendment rights by banning write-in voting. Pet. 13a.

Having determined that the district court's application of strict scrutiny to the PRA was error, the court of appeals then considered the appropriate constitutional standard. The court assumed that "signing a referendum petition has a 'speech' element such that petition signing qualifies as expressive conduct" and further "assume[d] that the PRA's public access provision has an incidental effect on referendum petition signers' speech by deterring some would be signers from signing petitions." Pet. 14a-15a. In light of these assumptions, the court of appeals concluded that the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968), applies to the PRA. Pet. 14a-16a. Applying the intermediate scrutiny test articulated in *O'Brien*, the court of appeals concluded that the PRA furthers important government interests unrelated to suppression of speech, and the incidental effect on speech is no greater than necessary. Pet. 16a.

The court of appeals began its analysis of the government interests furthered by the PRA by noting

this Court's recognition of a state's "'compelling interest in preserving the integrity of the election process.'" Pet. 16a (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). The court of appeals concluded that the PRA "plays a key role in preserving the integrity of the referendum process" by providing government transparency and accountability to the public generally. Pet. 17a. The court of appeals recognized that Washington's statute authorizing two opponents and two proponents of the referendum to view the Secretary's verification of signatures provides oversight by special interest groups, but does not provide oversight by the general public. Pet. 17a; Wash. Rev. Code § 29A.72.230 (2009).

The court of appeals then considered the PRA's role in enabling the public to "make meaningful use" of state law authorizing Washington citizens to challenge the Secretary's determination that the petition has sufficient signatures. Pet. 17a; Wash. Rev. Code § 29A.72.240 (2009). The court reasoned that without public disclosure, citizens could not inspect petition sheets and rationally determine whether they were dissatisfied with the Secretary's decision. This would render the superior court procedure "at best inefficient and at worst useless[.]" Pet. 17a-18a.

In addition, the court recognized that the State has an important "informational interest" in disclosure. Pet. 18a. The court explained that unlike campaign donors, "[r]eferendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect." *Id.* The public's interest in

knowing who has taken legislative action "is undoubtedly greater" than knowing what groups favor or oppose a ballot issue. Pet. 19a.

Based on this analysis, the Ninth Circuit concluded that "each of the State's asserted interests is sufficiently important to justify the PRA's incidental limitations on referendum petition signers' First Amendment freedoms," and held that the PRA "as applied to referendum petitions does not violate the First Amendment." Pet. 19a. Because the Sponsors failed to meet the first factor for a preliminary injunction—likelihood of success on the merits—the Ninth Circuit found it unnecessary to examine the remaining three factors. *Id.* n.14.

The court of appeals did not address the Sponsors' Count II claim regarding Referendum 71 because the district court based its preliminary injunction on Count I, and did not consider Count II. Pet. 10a n.6.

The Sponsors filed their Petition For A Writ Of Certiorari on November 6, 2009.[3] This Court granted the Sponsors' petition on January 15, 2010.

SUMMARY OF ARGUMENT

1. The Sponsors claim that public access to any referendum petition under the PRA violates their First Amendment right to anonymous speech. Although the Sponsors characterize this case as an as applied claim because they are challenging the PRA as applied to referendum petitions, the

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[3] On November 3, 2009, Washington voters approved Referendum 71.

Sponsors' legal theory applies to all referendum petitions, and would apply equally to initiative, recall, and candidate nominating petitions. The challenge thus is facial. Under the Sponsors' theory, no set of circumstances exists under which the PRA would be valid in requiring disclosure of petitions signed by voters. The Sponsors also raised an as applied challenge below, alleging that disclosure of Referendum 71 petitions will subject the signers to harassment. Neither the district court nor the court of appeals addressed this as applied claim, and it is not before the Court. If this Court affirms the Ninth Circuit, the parties will have the opportunity to litigate the as applied claim in the district court.

2. When citizens sign a referendum petition, they are exercising the same legislative power as the elected Washington Legislature, having reserved this power in the state constitution. Signing a referendum petition is a legally operative act. A referendum petition with the requisite number of signatures requires the Secretary to conduct an election, and suspends the operation of the law that is the subject of the referendum. Thus, signing a petition is the first step in the election process, analogous to seconding a motion in a legislative body. In a legislative body, if there is no second, the motion fails. When Washington's citizens legislate directly, if there are not enough signatures, the measure will not qualify to the ballot.

3. The act of signing a referendum petition is very different from speech or expressive conduct. It is not core political speech and involves no substantial expressive element. A voter who signs a petition has no control over the content of the

petition. Rather, the content is dictated by statute and the sponsor. A signer is limited to providing his or her name and certain other identifying information, and to directing the Secretary to place the referendum on the ballot. This is very different from speech in preparing or circulating a handbill where the author controls the handbill's content. It also is very different from circulating an initiative or referendum petition. That is core political speech because it involves interactive communication between the signature gatherer and the voter. However, not every aspect of the initiative or referendum process is core political speech. This includes the act of signing the petition, which simply is a necessary step in the election process to place the measure on the ballot.

4. Signing a petition is a public act, not anonymous speech. Signatures are gathered in public. A voter who signs a petition discloses his or her identity to voters who subsequently sign the petition, to individuals who look at the petition but choose not to sign, to passersby, to the people who gather the signatures, and to the sponsors of the measure. Moreover, a voter has no control over how the information that he or she places on the petition will be used. Names and addresses on petitions can be sold or traded to other individuals and organizations and used for fund raising purposes.

5. Because signing a petition is an act without significant expressive content, instead of core political speech, it is subject to intermediate scrutiny. The PRA is valid because it furthers substantial government interests, and any incidental restriction on alleged First Amendment freedoms is

no greater than is essential to the furtherance of those interests. The PRA furthers two substantial government interests: an interest in government transparency and accountability and an interest in providing information to voters. The PRA ensures that Washington citizens have access to public records necessary to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot. The PRA also provides relevant information to Washington voters about who invoked the people's legislative power to direct that an election be held, and to suspend the operation of a law.

6. The PRA also satisfies other levels of First Amendment scrutiny. The Court has applied exacting scrutiny to disclosure requirements. Contrary to the Sponsors' claim, exacting scrutiny is different from strict scrutiny and requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. The PRA is substantially related to the government's interests in transparency and accountability, and in providing information to voters.

The PRA is also valid if viewed as an election regulation. If an election statute imposes a modest burden, a state's important regulatory interests are sufficient to justify reasonable, nondiscriminatory regulation. Disclosure under the PRA imposes a modest burden. It occurs after the petitions have been filed, after the circulation process has been completed, and precludes no speech.

Finally, the PRA satisfies strict scrutiny. The government interest in transparency and accountability and in providing information to voters is compelling, and the law is narrowly tailored, being neither underinclusive nor overinclusive in achieving its purposes.

ARGUMENT

A. This Case Presents A Broad Facial Challenge To The Disclosure Of Petitions Under The PRA

This case is limited to Count I of the Sponsors' complaint, which presents a facial challenge to the PRA. A "plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The Sponsors characterize their Count I challenge to the PRA as an "as applied" challenge because they are challenging the PRA "as applied to referendum petitions[.]" Pet'rs' Br. 10. However, their claim is actually facial. Under the Sponsors' theory, no set of circumstances exists under which the PRA could validly require disclosure of any voter petition filed with the government, including referendum, initiative, recall, and candidate nominating petitions. According to the Sponsors, the PRA is unconstitutional in all applications requiring disclosure of petitions. The Sponsors acknowledge that this is "not a challenge based on the

peculiarities or special circumstances of any group or individuals. It is not the sort of as applied challenge that a group would bring, based on its particular experience, to obtain an intimidation exemption under *Buckley*'s reasonable-probability test, *see Buckley*, 424 U.S. at 72-74." Pet'rs' Br. 33.

The Sponsors have an extended discussion in their brief, regarding their claim that people who do not believe that domestic partnerships should have equal rights as married couples will be subject to harassment if their names are made public. Pet'rs' Br. 2-7, 10-11. But this discussion is only relevant to Count II of the Sponsors' Complaint where the Sponsors allege that releasing Referendum 71 petitions would violate the petition signers' First Amendment right of association because disclosure would subject them to harassment. Count II presents an as applied challenge to the PRA.

The Sponsors' discussion of harassment is not relevant to this facial challenge. As the Court explained in *Citizens United*, under *McConnell v. Federal Election Commission*, 540 U.S. 93, 198 (2003), the disclosure requirement "would be *unconstitutional as applied* to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010). *Citizens United* did not address an as applied challenge because Citizens United "has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has

identified no instance of harassment or retaliation." *Id.*

This case differs from *Citizens United* because the Sponsors claim to have suffered harassment. But this as applied challenge is before the district court in Count II. Neither the district court nor the court of appeals ruled on the Sponsors' Count II challenge (Pet. 10a n.6, 43a) and it is not fairly within the question presented. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007). If this Court affirms the Ninth Circuit, the Sponsors will have the opportunity to present evidence to satisfy the reasonable probability test, and the Respondents will have an opportunity to rebut that evidence.

B. Signing A Petition Is A Legally Operative Legislative Act, Not Speech—Any Element Of Speech Is Incidental

The Sponsors' First Amendment argument is based on their claim that signing a referendum or other petition is core political speech. Signing a petition is a legally operative legislative act similar to seconding a motion in parliamentary procedure. Any expressive aspect of signing a petition is incidental to its operative legislative purpose and is a quintessentially public act.

1. Signing A Petition Is A Legislative Act That Is The First Step In The Election Process

There are two ways to require a referendum in Washington. First, the Washington Legislature may order a referendum election on a law it has passed. Second, the people can direct the Secretary to

conduct a referendum election if there are enough signed petitions. Wash. Const. art. II, § 1(b) ("The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature . . . either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted[.]").

Thus, when Washington citizens sign an initiative or referendum petition they are exercising the same power as the Washington Legislature. This is the legislative power that people reserved to themselves in the Washington Constitution. This Court recognized the principle of reserved legislative authority in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). *City of Eastlake* dealt with a challenge to a city charter provision requiring "that any changes in land use agreed to by the Council be approved by a 55% Vote in a referendum." *Id.* at 670. In rejecting a claim that this constituted an unconstitutional delegation of power, this Court stated that "[a] referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672 (citation omitted). The Court explained that this "reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic

processes." *Id.* at 672-73. Similarly, the referendum "is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Id.* at 673.

In the Washington Constitution, "the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." Wash. Const. art. II, § 1. The Washington Supreme Court has stated that the "exercise of the initiative power is an exercise of the reserved power of the people to legislate" and that "[in] approving an initiative measure, the people exercise the same power of sovereignty as the legislature does when enacting a statute." *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 779 (Wash. 2000).

The principle that the initiative and referendum power is legislative authority reserved by the people is not limited to Washington. Other states whose constitutions authorize the people to adopt initiatives and referendum also recognize this principle. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) ("By the express provisions of the Colorado Constitution the people have reserved for themselves the right to legislate. Colo. Const. Art. V, Sec. 1. This right is of the first order; it is not a grant to the people but a reservation by them for themselves."); *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 314 (Or. 2006) ("In Oregon, the Legislative Assembly and the people, acting through

the initiative or referendum processes, share in exercising legislative power. *See* Or. Const., Art. IV, §§ 1(1), (2)(a), (3)(a) (vesting in both bodies the power to propose, enact, and reject laws)."); *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002) ("[T]he Utah Constitution vests the people's sovereign legislative power in both (1) a representative legislature and (2) the people of the State, in whom all political power is inherent. Utah Const. art. VI, § 1(1) (Supp. 2001) . . . . Article VI, section 1 is not merely a grant of the right to directly legislate, but reserves and guarantees the initiative *power* to the people.").

A referendum petition receiving the constitutionally required number of signatures has two legally operative effects. First, the Secretary is required to conduct an election with regard to the measure. Second, the operation of the law subject to referendum is suspended, instead of going into effect ninety days after the adjournment of the legislative session in which it was adopted. Wash. Const. art. II, § 1(d) provides "[s]uch measure shall be in operation on and after the thirtieth day after the election at which it is approved."[4]

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[4] In a claim that is not properly before the Court, the Sponsors argue for the first time that if signing a petition is a legislative act, then disclosing the Referendum 71 petitions would violate the voters' right to a secret ballot. Pet'rs' Br 20-21. This Court has never held that there is a constitutional right to a secret ballot, although the Court recognizes that "voting is of the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433. The Washington Constitution guarantees a secret ballot. Wash. Const. art. VI, § 6. Even assuming such a right, the two decisions upon which the Sponsors rely do not support their

2. Signing An Initiative Or Referendum Petition Is Analogous To Seconding A Motion In The Legislative Process

Signing an initiative or referendum petition is analogous to seconding a motion in a legislative body. When a motion is offered in a legislative body, there must be a second; if there is no second, the motion fails. Sarah Corbin Robert et al., *Robert's Rules of Order* § 4, at 34-35 (10th ed. 2000). If there is a second, the Chair restates the motion and presents it to the assembly for debate. *Id.* at 36. Like a second in the legislative arena, the purpose of gathering voters' signatures is to satisfy a legislative

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claim: *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), and *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000). In *Anderson*, the candidate nominating petition required the signer to declare "the subscribers desire . . . to vote for the candidate." *Anderson*, 664 F.2d at 608. In *Glickman*, the referendum petition signers were required to state: "We support a voluntary checkoff program." *Glickman*, 200 F.3d at 1187. Thus, in each of these cases, signing the petition required the signer to disclose how the signer would vote. Washington's referendum petitions contain no similar language. Wash. Rev. Code § 29A.72.100 (2009). The signers simply direct the Secretary to conduct an election. J.A. 31. There is nothing on the petition that indicates how a signer will vote. The Sponsors point to advertising language that they opted to include on the top of the Referendum 71 petition, that urges people to support the measure to "Preserve Marriage, Protect Children." J.A. 31. However, the Sponsors admit that the "required 'official' language on these forms (below the '[h]ighlights' box in smaller fonts) is neutral, so some signers reading that may have merely intended to put the matter before the voters without expressing an opinion on the issue[.]" Pet'rs' Br. at 21. The availability of signed referendum petitions under the PRA does not violate any requirement for a secret ballot.

requirement. Without the requisite signatures or "seconds," the measure will not proceed in the legislative process. As the Court explained in the context of candidate nominating petitions, there "is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The same is true for ballot measures.

The concept that signing a petition is analogous to seconding a motion is an old one. A 1912 treatise explained that "the citizen who proposes it [a measure] must secure in advance the voluntary coöperation of a certain number or percentage of his fellow-citizens who are willing to join him in insisting upon bringing the matter formally before the entire body of voters." Delos F. Wilcox, *Government By All The People* 15-16 (1912). "This requirement is analogous to the parliamentary rule that a motion must be seconded before it will be considered[.]" Wilcox at 16. "The first signer of a popular petition, therefore, may be considered as the mover of the resolution and all the other signers as seconders." Wilcox at 16.

So, similar to a legislative body, the sponsor of a measure is like a legislator making a motion. The sponsor drafts the measure and takes all the steps necessary to prepare the petition, including obtaining a ballot title and having the actual petitions printed. Voters who sign the petition are analogous to other legislators who second the

sponsor's motion. A measure will only qualify for the ballot if it receives the constitutionally required number of signatures.

3. Signing An Initiative Or Referendum Petition Does Not Involve A Significant Element Of Expressive Conduct

The Sponsors contend that signing an initiative or referendum petition is core political speech. Apart from providing statutorily required information and direction to the Secretary to hold an election, the Sponsors acknowledge that one cannot discern what a signature expresses. Pet'rs' Br. 21. It may or may not mean the signer supports the referendum. For some signers, it may express nothing more than a decision to appease the signature gatherer and be on the signer's way. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. In this and other significant respects, signing an initiative or referendum petition is decidedly different from speech or expressive conduct, let alone core political speech.

The conduct of signing a petition is simply part of the election process, not expressive conduct. In *Burdick*, 504 U.S. 428, this Court rejected a First Amendment challenge to write-in voting. The Court held that "the function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal

quarrel[s]." *Id.* at 438 (alteration in original) (citation and internal quotation marks omitted). Similarly, the function of signing a petition is to winnow out the measure that will make the ballot, and those that will not. According to the Court, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.*

Signing a petition is unlike distributing handbills or circulating petitions because the signer has no control over the content of the petition. The sponsor determines the text of the initiative or identifies the parts of a law that are subject to referendum, and files the proposed initiative or referendum with the Secretary. Wash. Rev. Code § 29A.72.010 (2009). Once it is filed, the text cannot be changed. *Washington Citizens Action of Washington v. State*, 171 P.3d 486, 493 (Wash. 2007) ("[T]here is no mechanism for amendment of the text of an initiative after an initiative is filed. Wash. Const. art. II, § 1[.]"). State law requires that the petition include specific information and warnings. Wash. Rev. Code § 29A.72.130-.140 (2009); *supra* p. 3-4; J.A. 29. Once the printed petitions are circulated, the only thing a citizen can do is sign the petition and provide the required information. Wash. Rev. Code § 29A.72.130 (2009) (The referendum "petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.").

In contrast, a person circulating a handbill has control over the content of the handbill, including whether to disclose his or her identity. As the Court

explained in *McIntyre*, 514 U.S. at 348, "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." The same is true of a person circulating a petition. The circulator is in control of the arguments he or she will use to persuade a voter to sign the petition. A person signing a petition makes no such argument and has no such control.

Speech involved in distributing a handbill or circulating a petition, and the action of signing a petition, also have different effects. The speech adds to the public debate on an issue, but it has no legally operative effect. In contrast, the act of signing a petition, if enough voters sign, has a legally operative effect. A valid petition requires that an election be held, and in the case of a referendum, it suspends the operation of a law passed by the legislature and signed by the governor. Wash. Const. art. II, § 1(d).

4. *Meyer* And *Buckley II* Do Not Hold That The Act Of Signing An Initiative Or Referendum Petition Is Core Political Speech Subject To Strict Scrutiny

The Sponsors' primary argument is that *Meyer*, 486 U.S. 414, and *Buckley II*, 525 U.S. 182, hold that everything connected with circulating petitions is core political speech subject to strict scrutiny. Pet'rs' Br. 17, 25, 40-41. The Sponsors' reading of *Meyer* and *Buckley II* is incorrect. Neither decision stands for the proposition that everything connected with the initiative process is core political

speech, and neither decision holds that the act of signing a petition is speech at all.

The Court has referred to petition circulation as core political speech because petition circulation involves interactive communication—the exchange of ideas between the voter and the signature gatherer with respect to the proposed measure. Thus, *Meyer* explained that the "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421. Thus, a signature gatherer "will in almost every case involve an explanation of the nature of the proposal and why its advocates support it." *Id.* This is why "the circulation of a petition involves *the type of interactive communication concerning political change that is appropriately described as 'core political speech.'*" *Id.* at 421-22 (emphasis added). The core political speech is the interactive communication. As previously explained, signing a petition does not involve any significant expressive element (*supra* p. 28-30) nor does it involve any interactive communication.

Similarly, relying on *Meyer*, *Buckley II* stated that "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change.'" *Buckley II*, 525 U.S. at 186. Thus, "[p]etition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in 'interactive communication concerning political

change.'" *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part).

However, the fact that the interactive communication involved in petition circulation is core political speech subject to strict scrutiny does not mean that everything connected to the initiative process is core political speech. *Buckley II* expressly rejects that notion. According to the Court in *Buckley II*, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.* at 191. "*Not all circulation-related regulations target this [interactive communication] aspect of petition circulation. . . . Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies for placement* on the ballot." *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added). "These latter regulations may indirectly burden speech but are a step *removed from the communicative aspect of petitioning* and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review." *Id.* (emphasis added). Signing a petition is removed from the communicative aspect of petitioning, and is necessary for an orderly election process. The public availability of signature petitions under the PRA is even farther removed, and as is discussed below (*infra* p. 56-57), substantially furthers vital government interests.

5. Signing An Initiative Or Referendum Is A Public Act, Not Anonymous Speech

Signing an initiative or referendum petition is a public act, not anonymous speech. As a manual for initiative sponsors explains, signature gathering takes place at "college registrations and polling places, meetings, fairs, art shows (gold mines), concerts (less good), and theater ticket lines (what have they got to do but read your petition?) [which] are standard collection points." Mike A. Males, *Be It Enacted By the People: A Citizens' Guide to Initiatives*, The NRAG Papers, Vol. 4, No. 2, at 4 (Fall 1981). "[D]owntown streets are good places for tables and 'hawking' (two behind the table witnessing signatures, two in front soliciting passersby), and public buildings like the post office also produce a steady stream." *Id.* "Voters will also sign unattended petitions next to cash registers in shops." *Id.* Signatures were gathered for Referendum 71 in such public places. *Supra* p. 7.

The Sponsors acknowledge that signatures were gathered in public, but argue that the disclosure was limited to like-minded individuals. According to the Sponsors, the relationship between signers and signature gatherers is like the relationship between the authors of the Federalist Papers and the printers they employed. Pet'rs' Br. 35-36. There is no comparison between the printers of the Federalist Papers and those who sponsor and gather petition signatures. The printers of the Federalist Papers were agents of the authors. Sponsors and signature gatherers are not agents of the individuals who sign the petitions. Sponsors and

signature gatherers can and do use the signatures for purposes unrelated to the signed petitions; signers do not control such use.

The names and addresses on petitions can be sold or traded to other organizations or individuals. *See, e.g.*, Jim Camden, SpokesmanReview.com, *John Hancocks In Tug of War* (June 16, 2006), *available at* http://www.spokesmanreview.com/tools/story_pf.asp?ID=135916 (last visited Mar. 24, 2010) (The "president of Faith & Freedom, said Thursday the religious network had hoped to develop a mailing list for future efforts to overturn the law. If a new referendum or initiative campaign is launched, they'd probably mail a copy of that petition to the people who signed Referendum 65, asking them to sign the new proposal and have their friends sign it, too."). The names and addresses on petitions may also be used for fund raising. Indeed, in discussing fund raising, the manual for initiatives explains that: "Your petitioners are another gold mine." Males at 8.

In this case, it appears that the sponsor of Referendum 71, Protect Marriage Washington, did not gather the voters' signatures for the sole purpose of qualifying Referendum 71 for the ballot. The Referendum 71 petitions also had a space for the signers to provide their email addresses (J.A. 31), even though state law does not require voters to provide their email addresses, and the Secretary does not use email addresses to verify voters' signatures. Protect Marriage Washington converted from a single measure political committee to an ongoing political committee after the election in November 2009. *See* http://www.pdc.wa.gov/

QuerySystem/politicalcommittees.aspx (last visited Mar. 24, 2010). State law provides no statutory prohibition on use of any information Protect Marriage Washington gathered on the initiative petitions while it was a single issue committee. It would not be surprising if the names, addresses, and email addresses on the petitions are now being used to solicit donations for the political committee. *See id.*

The Sponsors argue that disclosure to other individuals who signed Referendum 71 petitions is not disclosure to the public and, consequently, the state must provide a separate justification to disclose the petitions to the Secretary for verification, and to the public under the PRA. Pet'rs' Br. 35-39. As previously explained, the Sponsors' basic premise is flawed—Referendum 71 petitions were disclosed to the public. The Sponsors' reliance on *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, and *AFL-CIO v. Federal Election Commission*, 333 F.3d 168 (D.C. Cir. 2003), to support their argument is misplaced. Neither case involved disclosure to public analogous to the signature-gathering process for a ballot measure.

Glickman applied the personal privacy exemption in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1994), and involved "a petition that call[ed] for a referendum to terminate a federally-imposed assessment on pork sales." *Glickman*, 200 F.3d at 1182. The only individuals who could sign "were actually pork producers or importers during the representative period." *Id.* at 1183. The court held that petition signers did not waive their right to privacy under the act and that

"the petitioners would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum." *Id.* at 1188.

The situation with signature gathering for referendum and initiative petitions generally, and for Referendum 71 specifically, is quite different. Although *Glickman* does not explain how the signatures were gathered for the referendum there at issue, it is unlikely that it was the same kind of public process involved in gathering signatures for initiative and referendum petitions. It seems unlikely that the Campaign For Family Farms set up tables outside of Wal-Mart and Target and asked passersby if they were pork producers or importers, and, if so, would they sign the petition. In the case of Referendum 71, the act of signing was public. Individuals were asked to read the petition sheets, which openly displayed the signatures that had been gathered. Although some chose to sign, other people may have opposed the petition. Discussion and reading of the petitions ensures that the names of petition signers are exposed to persons who do not agree with the cause.

AFL-CIO dealt with disclosure of records the Federal Election Commission obtained during the investigation of a complaint against the AFL-CIO and others. In the course of the investigation, the Commission "subpoenaed approximately 50,000 pages of documents[.]" *AFL-CIO*, 333 F.3d at 171. Unlike the petitions at issue in Referendum 71, the subpoenaed documents were never disclosed to the

public in the first instance. There was disclosure only to the government.

C. If The PRA Implicates First Amendment Rights At All, It Is Subject To Intermediate Scrutiny And Satisfies Its Standards

1. The Standard For Intermediate Scrutiny

For reasons explained above, the act of signing a referendum petition does not include any significant element of speech. Even if one were to assume that the act of signing a referendum petition implicates the First Amendment, the assumption would not mean that a law incidentally affecting the act of signing, such as the PRA, is impermissible. On the contrary, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. In such circumstances, "a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad.*, 512 U.S. at 662. "'Rather, the requirement of narrow tailoring is satisfied 'so long

as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))). The PRA meets all of these requirements.[5]

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[5] The Sponsors contend that intermediate scrutiny does not apply because the PRA is not viewpoint neutral and is content-based and thus should be subject to strict scrutiny Pet'rs' Br 40. These arguments also lack merit. Viewpoint discrimination is a form of content discrimination that occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U S. 819, 829 (1995) Under the PRA, referendum signature petitions are available to the public without regard to the "motivating ideology or the opinion or perspective of the speaker." *Id.* Indeed, signed referendum petitions would be equally available under the PRA whether the referendum petition sought to set aside a law that granted rights to domestic partners, or a law that denied such rights to domestic partners. The "principal inquiry in determining content neutrality . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad.*, 512 U S. at 642 (quoting *Ward*, 491 U S. at 791). "[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral " *Id.* at 643. The Sponsors acknowledge that the PRA is facially content neutral. Pet'rs' Br. 42. Although the Sponsors observe that the PRA includes numerous exemptions, they point to nothing to show that any exemption, or lack of exemption from the PRA, is a function of government agreement or disagreement with the "message" that a particular type of public record may convey.

2. The PRA Furthers Two Substantial Government Interests

The PRA furthers two substantial government interests. The first is the interest in government transparency and accountability. The second is providing relevant information to Washington voters.

a. The PRA Furthers The Substantial Interest Of Government Transparency And Accountability

The "purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 884 P.2d 592, 597 (Wash. 1994) (citing Wash. Rev. Code § 42.17.251 (1994), *recodified* Wash. Rev. Code § 42.56.030 (2006)). Washington is not alone in recognizing that access to government records is essential to the proper functioning of a democracy. For example, in discussing its state public records law, the Ohio Supreme Court recognized that "[a] fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government's work and decisions." *Kish v. Akron*, 846 N.E.2d 811, 816 (Ohio 2006). To the same effect is *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 74-75 (Tenn. 2002) ("[Tennessee Public

Records Act] serves a crucial role in promoting accountability in government through public oversight of governmental activities."). *See also Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) ("[T]he purpose of Florida's public records act . . . 'is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.'").

This Court has articulated essentially the same point in the First Amendment context. "The freedom of the press to publish [information in public records] appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Indeed, the citizenry may make informed judgments about the proper conduct of government business only if it has access to the public records necessary to make those judgments. The PRA provides such access.

In the particular context of the instant case, the government's interest in transparency and accountability applies with even greater force because the State "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco County Democratic Cent. Comm'n*, 489 U.S. 214, 231 (1989). "Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89

(1978) (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (footnote omitted)).

The PRA serves this heightened interest by ensuring that Washington citizens have access to public records necessary to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot. Under Wash. Rev. Code § 29A.72.240 (2009), "[a]ny citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters" may challenge that determination in court. Without access to the signed petitions, Washington citizens would have no meaningful opportunity to determine whether to mount such a challenge, let alone to succeed in one. Without access to the signed petitions, Washington citizens dissatisfied with the Secretary's determination would not even be able to determine whether the gross number of signatures submitted satisfied the constitutional minimum. *See* Wash. Const. art. II, § 1(b) (requiring signatures equaling at least four percent of the number of votes cast for governor in the last gubernatorial election preceding the filing of the measure). Nor would Washington citizens be able to evaluate whether duplicate signatures were submitted, whether signers were registered to vote, or whether other statutory requirements relating to such petitions were satisfied. In short, without the access to signed petitions that the PRA provides, Washington's citizens could not fulfill their role as "the final judge of the proper conduct of public business." *Cox Broad.*, 420 U.S. at 495.

The Sponsors try to reduce this government interest in transparency and accountability to an interest in preventing fraud, and then discount their artificially narrowed interest on the basis that criminal penalties are adequate to deter fraud. Pet'rs' Br. 50. Preventing fraud is a very important government interest. However, the government's interest in transparency and accountability is substantially broader. It encompasses identifying innocent errors with respect to signatures and signature petitions, as well as oversight of the simple accuracy of the Secretary's certification of petitions. Petition signers may make errors in the signing process that do not involve fraud. Similarly, the Secretary may make errors in accepting or rejecting signatures without any occurrence of fraud. For example, over a ninety-day signature gathering period, a voter may innocently sign a referendum petition more than once, or a voter may sign a petition mistakenly believing that he or she is registered to vote. The Secretary may or may not correctly identify all such errors, or the Secretary may incorrectly conclude that a signature is a duplicate when it is not, or that a signature belongs to a person who is not eligible to vote in Washington, when in fact the person is properly registered.[6]

After artificially restricting the government's interest in transparency and accountability to

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[6] For example, in canvassing the signatures for Referendum 71, the Secretary concluded that there were 2,104 duplicate signatures Another 12,316 signatures were rejected because no voter registration could be found *See* http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71SignatureStats.aspx (last visited Mar. 24, 2010).

preventing fraud, the Sponsor also argues that occurrences of fraud are rare. Pet'rs' Br. 50. For this proposition, the Sponsor largely relies on a statement from *Meyer v. Grant*, 446 U.S. at 427, that the risk of fraud or corruption by petition circulators is more remote at the petition stage than at the time of balloting. No empirical support for this statement appears in the Court's opinion, and the statement itself is limited and relative. It suggests only that the risk of fraud or corruption is less pronounced during signature gathering than at the time of voting. The statement does not suggest that fraud and corruption in the petition process are somehow speculative, conjectural, or less than real, and actual experience reflected in reported cases demonstrates otherwise. *See, e.g., Roberts v. Priest*, 975 S.W.2d 850 (Ark. 1998) (holding initiative petition lacked sufficient support based in part on invalidated forged signatures); *Citizens Comm. for D.C. Video Lottery Terminal Initiative v. District of Columbia Bd. of Elections & Ethics*, 860 A.2d 813, 813-14 (D.C. 2004) (affirming Board's decision to reject initiative petitions based on false and forged signatures); *State v. Pappas*, 424 N.W.2d 604 (Neb. 1988) (affirming conviction of aiding and abetting another to willfully and falsely swear to signature upon initiative petition); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 770 (Mont. 2006) (affirming trial court determination that initiative signature gathering process was permeated by a pervasive and general pattern and practice of fraud); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006) (invalidating signature petitions based on fraudulent circulator affidavits).

Moreover, the Sponsors do not assert that errors in the signature gathering process and in the signature verification process that are not the product of fraud somehow are rare. Again, reported cases show otherwise. *See, e.g., Oklahomans For Modern Alcoholic Beverage Controls, Inc. v. Shelton*, 501 P.2d 1089 (Okla. 1972) (reversing secretary of state's determination of petition invalidity, and determining validity of signatures); *Las Vegas Convention & Visitors Auth. v. Miller*, 191 P.3d 1138 (Nev. 2008) (affirming secretary of state's decision striking initiative petition signatures for failure to substantially comply with circulator affidavit requirement); *Energy Fuels Nuclear, Inc. v. Coconino County*, 766 P.2d 83 (Ariz. 1988) (petition signatures held invalid based on lack of proper voter registration); *Porter v. McCuen*, 839 S.W.2d 521 (Ark. 1992) (proposed initiative removed from ballot for lack of requisite valid signatures based on failure to comply with variety of statutory signature gathering requirements). The government's interest in the transparency and accountability fostered by the PRA is compelling and substantial.

b. There Is A Substantial Interest In Providing Information To Voters

The second important government interest furthered by the PRA in the context of this case is providing relevant information to Washington voters. ThePRA affords Washington voters the opportunity to learn who is operating the levers of state government by invoking the people's direct legislative power. More specifically, access to signed petitions allows Washington's voters to know who

demanded that an election be held on an enacted law, and who demanded that the law be suspended pending the results of the election.

Far from being in tension with the First Amendment, as the Sponsors suggest, the availability of this information furthers the purpose of the First Amendment. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes . . . all such matters relating to political processes." *Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966). The First Amendment helps to ensure that our "constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605 (1982).

The availability of referendum signature petitions allows Washington voters to engage in discussion of referred measures with persons whose acts secured the election and suspension of state law.

The Sponsors' response to the government informational interest is not persuasive. The Sponsors argue that the government's informational interest is not absolute. Pet'rs' Br. 50. No one is suggesting that it is. Nor is anyone (other than the Sponsors) arguing that, regardless of the justifications for a law or its consequences for legitimate First Amendment interests, government could require disclosure of a wide swath of information from petition signers. *Id.*

The Sponsors endeavor to diminish the government's informational interest by asserting that "[m]arginal information [conveyed to the voters] cannot justify the substantial burdens imposed by compelled disclosure of the identities of 138,000 individuals." Pet'rs' Br. 49. Contrary to the implicit assumption in this argument, the PRA does not compel the disclosure of any information. Washington election statutes, that the Sponsors quite understandably do not challenge, require disclosure of petition signers' identities on referendum petitions as a necessary part of protecting the integrity of Washington's electoral process. Petition signatures are public long before the PRA comes into play. *See* Wash. Const. art. II, § 1(b); Wash. Rev. Code §§ 29A.72.100, .130, .140, .150 (2009). Moreover, as demonstrated above, the PRA imposes no substantial burden on the First Amendment rights of petition signers. The PRA does not affect in any way a petition signer's right to speak with petition circulators or others about the subject of a referendum or initiative, or to otherwise communicate his or her views about the subject of the referendum. The PRA provides only public access to the government's official record of the legally operative legislative act of signing the petition.

Finally, the Sponsors provide no meaningful support for the assertion that the information at issue is merely "marginal." "Research shows that voters find cues about how their interests might be affected by a proposed initiative or referendum. One of the most useful of these cues is knowing who favors or opposes a measure." M. Dane Waters,

Initiative and Referendum Almanac 456 (2003). Despite their argument, the Sponsors recognize this fact. It explains why the Sponsors themselves included the names, photographs, and statements of several Washingtonians who supported Referendum 71 on the Referendum 71 signature petitions. J.A. 32.

This informational interest is not undercut by the fact that some voters may sign a petition just to put the measure on the ballot. Knowing who wants to have an election on a ballot measure is useful information. In *Citizens United*, the plaintiff argued that the government's informational interest did not apply to "to its ads, which only attempt to persuade viewers to see the film [because] the information would not help viewers make informed choices in the political marketplace." *Citizens United*, 130 S. Ct. at 915. The Court rejected this argument because, "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* Similarly, in this case people have an interest in knowing who directed that an election be conducted on the measure. A voter who asks a neighbor why he or she signed a petition obtains useful information, even if it is only that the neighbor has not decided how to vote on the measure.

This is not unique to issue elections. Use of information available through state disclosure of voter information, cross referenced with other information available on the internet, is widely used by the Republican and Democratic parties to communicate directly with individual voters. "These

databases put together phone numbers, voting history, age, marital status, race, income and other demographic information". Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 Geo. Wash. L. Rev. 1070, 1071 (2005). This information does not reveal how a person voted, but it provides useful information about participation in the political process. The same is true of petitions.

The government's interests in transparency and accountability, and in providing information to voters, furthered by the PRA, are thus substantial and compelling. They satisfy intermediate scrutiny.

3. The PRA Is Unrelated To The Suppression Of Free Expression

The PRA also satisfies the second prong of intermediate scrutiny. The government interests in transparency and accountability, and in providing information to voters, are "unrelated to the suppression of free expression". *O'Brien*, 391 U.S. at 377. Rather than being designed to suppress speech, the government's interests promote the purposes of the First Amendment. "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills*, 384 U.S. at 218-19. The First Amendment ensures that our "constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 605. The PRA allows Washington citizens to obtain information about the government's legislative process so that they may have a meaningful role in protecting the integrity of

the State's electoral process, and so that they may make informed decisions with respect to important public issues.

4. The PRA Satisfies The Narrow Tailoring Requirement For Intermediate Scrutiny

Finally, the PRA satisfies the narrow tailoring requirement for intermediate scrutiny. The Sponsors do not argue, and could not plausibly argue, that the government interests in transparency and accountability and in providing information to voters would be achieved as effectively in the absence of the PRA. Without the PRA, Washington citizens would be deprived of public information necessary for them to exercise oversight over the process of direct democracy. *See* Wash. Rev. Code § 29A.72.240 (2009). And, without the PRA, Washington citizens would not have public information about who has triggered a referendum election and the suspension of state law—information that may be useful to a voter in deciding how to vote on the measure. Instead, the Sponsors argue that these interests could be served by "better-tailored" regulations. Pet'rs' Br. 52-53. The Sponsors' arguments thus ignore the intermediate scrutiny test for appropriate tailoring—whether the government's interests would be achieved as effectively in the absence of the regulation. *Turner Broad.*, 512 U.S. at 662.

Even if that were not the case, the Sponsors' arguments that the PRA could be "better-tailored" miss the mark for additional reasons. The Sponsors argue that campaign contribution reporting serves any information interest. Pet'rs' Br. 49. This

argument assumes that contributors and petition signers are one and the same. Sponsors offer no basis for this assumption. Moreover, the Sponsors do not suggest that campaign contribution reporting serves the government interest in transparency and accountability with respect to the referendum process. For example, campaign donor information says nothing as to whether a petition signer was qualified to sign a petition, or whether the Secretary accurately verified and canvassed the petitions. Otherwise, the Sponsors simply express incredulity at the notion that a voter might be influenced in determining how to vote on a referendum by knowing who signed a petition. Pet'rs' Br. 51. The Sponsors' own action advising potential petition signers of the identity of Referendum 71 supporters, by placing such information on the signature petitions, surely undermines this claim. J.A. 32.

The Sponsors also incorrectly argue that the government's "anti-fraud interest" could be served by more narrow means. Pet'rs' Br. 52. The Sponsors contend review of petitions could be done by the Secretary, or by other public officials if, as the Sponsors suggest, the Secretary cannot be trusted. *Id.* This argument reflects the Sponsors' artificial narrowing of the government interest to one of preventing fraud. It misses the very point that private citizens have a role in our democracy to independently examine how the public's business is conducted, *Cox Broadcasting*, 420 U.S. at 495, and that they have a right under Wash. Rev. Code § 29A.72.240 (2009) to oversee the integrity of the petition verification process, whether for active misconduct or innocent error.

The Sponsors additionally argue that criminal penalties suffice to deter fraud, and thus adequately address the government's "anti-fraud interest." Pet'rs' Br. 53. Again, this argument suffers from the Sponsors' erroneous narrowing of the government interest in transparency and accountability to an interest only in preventing criminal misconduct. The argument additionally is flawed in that it simply assumes, without basis, that the same capacity to detect fraud (or other errors) would exist with or without the participation of interested citizens who are informed by public disclosure of the petitions. Contrary to the Sponsors' argument, the government is not powerless to safeguard the integrity of its election processes by all appropriate prophylactic means, and relegated only to criminal prohibitions.

Finally, the Sponsors suggest that if the government transparency and accountability interests were strong, the PRA would be part of Washington's election code. Pet'rs' Br. 52. In every meaningful sense, the PRA *is* part of Washington's election code. There hardly could be more plain proof of that fact than the instant case. Far from indicating a weak government interest, the fact that the people of Washington, acting through the initiative process, made the PRA broadly applicable across government demonstrates the strong interest of Washington's citizens in government transparency and accountability, and in the availability of public information.

D. If The PRA Implicates First Amendment Rights At All, It Also Satisfies Other Levels Of First Amendment Scrutiny

To the extent the PRA implicates protected speech, the Ninth Circuit correctly applied intermediate scrutiny. However, even if the Court applies a different level of scrutiny, the PRA does not violate the First Amendment.

1. The PRA Satisfies Exacting Scrutiny

In *Citizens United*, the Court explained: "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' *Buckley* [*v. Valeo*, 424 U.S at 64] and 'do not prevent anyone from speaking,' *McConnell* [*v. Federal Election Commission*, 540 U.S. at 201.]" The Court stated that disclosure requirements are subject "to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest. *Buckley*, at 64, 66, 96 S.Ct. 612 (internal quotation marks omitted); see *McConnell, supra*, at 231-232, 124 S.Ct. 619." *Citizens United*, 130 S. Ct. at 914. Because the PRA is a public disclosure law, the Court might apply exacting scrutiny.

The PRA satisfies the exacting scrutiny test set out in *Citizens United*. The State has a substantial governmental interest in government transparency and accountability, and in providing information to the voters. *Supra* p. 44-48. And there is a substantial relation between the PRA and these interests. *Supra* p. 39-44.

The Sponsors argue that "exacting scrutiny" is a form of "strict scrutiny." Pet'rs' Br. 41-42. *Citizens United* lays this claim to rest. The Court stated that strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' [*Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S at 464.]" *Citizens United*, 130 S. Ct. at 882. In contrast, exacting scrutiny requires "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64, 66) (citing *McConnell*, 540 U.S. at 231-32). The two tests are obviously different.

The two tests apply to different burdens on speech. The Court applied strict scrutiny to "an outright ban [on corporate speech], backed by criminal sanctions." *Id.* at 897. The Court distinguished between this burden and "[d]isclaimer and disclosure requirements [that] may burden the ability to speak, but . . . impose no ceiling on campaign-related activities[.]" *Id.* at 914 (internal quotation marks omitted). Disclaimer and disclosure laws were not subject to strict scrutiny.

Contrary to the Sponsors' argument, the Court's application of exacting scrutiny in *Citizens United* is consistent with its use of exacting scrutiny in each of the election disclosure cases cited by the Sponsor. *Buckley II*, which the Sponsors contend applied strict scrutiny (Pet'rs' Br. 40), states that "'exacting scrutiny' is necessary when compelled disclosure . . . is at issue." *Buckley II*, 525 U.S. at 202. As in *Citizens United*, the *Buckley II* decision cites *Buckley v. Valeo* as supporting authority for

application of exacting scrutiny to election disclosure issues. *Buckley II*, 525 U.S. at 202. In a decision concurring in the judgment, Justice Thomas objected to the majority's analysis, stating that strict scrutiny should have been used. *Id.* at 207 (Thomas, J., concurring in the judgment). The Sponsors claim that *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), applied the "functional equivalent" of strict scrutiny to disclosure is also mistaken. Pet'rs' Br. 42-43. In *Davis*, the Court stated that "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the governmental interest 'must survive exacting scrutiny.'" *Davis*, 128 S. Ct. at 2775 (quoting *Buckley*, 424 U.S. at 64 (footnotes omitted)). Examination of the substantial relation between the government interest and the information to be disclosed is an exacting scrutiny analysis. It is not a strict scrutiny determination of whether there is a narrowly tailored, compelling government interest. Finally, the Court also applied exacting scrutiny in *McConnell* (Pet'rs' Br. 29) and held that requiring disclosure of electioneering communications "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *McConnell*, 540 U.S. at 231 (alteration in original) (quoting *Buckley*, 424 U.S. at 81).

Nor does *McIntyre* support the application of strict scrutiny to election petition disclosure. In *McIntyre*, the Court addressed election-related writings, distributed as anonymous handbills. The Court expressly distinguished its examination of

these writings from the exacting scrutiny analysis applied in *Buckley* to disclosure of campaign contributions made by individuals and groups. *McIntyre*, 514 U.S. at 355 ("[I]n another portion of the *Buckley* opinion we expressed approval of a requirement that even 'independent expenditures' in excess of a threshold level be reported to the Federal Election Commission. [*Buckley v. Valeo*, 424 U.S. 1] at 75-76. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. *See id.*, at 157-159[.]"). *McIntyre* explained that disclosure of an individual's campaign contribution "may be information that a person prefers to keep secret" and probably "gives away something about the spender's political views." *McIntyre*, 514 U.S. at 355. However, disclosing campaign contributions "reveals far less information" than the "particularly intrusive" disclosure of an author's "personally crafted statement of a political viewpoint." *Id.*

While exacting scrutiny is distinct from strict scrutiny, the exacting scrutiny test set out in *Citizens United* corresponds with the intermediate scrutiny test set out in *O'Brien*. *O'Brien* refers to the government's interest as "important or substantial." *O'Brien*, 391 U.S. at 377. *Citizens United* refers to "'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914. *O'Brien* requires the restriction to be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. *Citizens United* refers to a "'substantial relation' between the disclosure requirement" and

the government's interest. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

2. The PRA Is Valid As A Reasonable Election Regulation

Although the PRA is not codified as part of Washington's election law, or applicable only in the election context, it applies to initiative and referendum petitions. For this reason, the PRA might be evaluated under the flexible test that the Court applies to judge election regulations under the First Amendment. As the Court explained in *Washington State Grange v. Washington State Republican Party*, 552 U.S. at 451-52: "Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest. If a statute imposes only modest burdens, however, then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." (Citations and internal quotation marks omitted.)

Releasing signed petitions, at most, imposes only a minimal burden on signers' First Amendment interests. Signed petitions are released only after they have been publicly signed and submitted to the Secretary—that is, after they become public records. Disclosure under the PRA does not implicate the interactive communication that exists when a signature gatherer is trying to persuade a voter to sign the petition.

In this respect, disclosure under the PRA is like the circulator affidavit the Court approved of in

Buckley II. There, state law required the petition circulators to "attach to each petition section an affidavit containing, *inter alia*, the circulator's name and address and a statement that he or she has read and understands the laws governing the circulation of petitions[.]" *Buckley II*, 525 U.S. at 188-89 (footnotes and internal quotation marks omitted). The affidavit was a "public record." *Id.* at 198. The Court approved of the affidavit requirement because it "does not expose the circulator to the risk of 'heat of the moment' harassment. *Cf.* [*Am. Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 1004] (observing that affidavits are not instantly accessible, and are therefore less likely to be used 'for such purposes as retaliation or harassment')." *Buckley II*, 525 U.S. at 199. The same is true with respect to the release of petitions under the PRA. The State's interests in government transparency and accountability, and in providing voters with information, are important interests that justify this modest burden. *See supra* pp. 39-48.

3. The PRA Satisfies Strict Scrutiny

Strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' [*Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S at 464.]" *Citizens United*, 130 S. Ct. at 882. The State's interest in government transparency and accountability and in providing information to the voters is compelling. *Supra* p. 39-48. And we have already discussed why the Sponsors' narrow tailoring arguments fail, and those reasons apply equally to strict scrutiny narrow tailoring. *Supra* p. 49-51.

In addition, strict scrutiny narrow tailoring also requires that the law be neither underinclusive nor overinclusive. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 793 (law failed narrow tailoring because "the provisions of the statute . . . are both underinclusive and overinclusive"). The Sponsors have not argued that the PRA fails this standard, and it does not.

In *Bellotti*, the Court considered a statute that prohibited "corporate expenditures related to individual tax referenda[.]" *Bellotti*, 435 U.S. at 775. One of the governmental interests asserted in defense of the statute was "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." *Id.* at 787. With regard to this interest, the Court held that the "underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted . . . even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters." *Id.* at 793. In addition, the statute did not "prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less." *Id.* Indeed, the Court explained that the "fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been

concerned with silencing corporations on a particular subject." *Id.* The Court also pointed to the fact that "the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations [from the statute] undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8." *Id.*

In contrast, the PRA is not underinclusive. All petitions for initiatives, referendum, recall, and candidate nomination are public records subject to disclosure. There is no subject matter that is excluded. And the PRA is not limited to state government; it also applies to local government, so petitions filed with city, county, or local election officials are subject to disclosure.

In *Bellotti*, the "overinclusiveness of the statute [was] demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure." *Id.* at 794. There is no similar overinclusiveness in the PRA. Petitions are only disclosed in response to a public records request. Thus, there is only disclosure if citizens desire to make a decision about government accountability or obtain public information.

Because there are compelling government interests for the PRA, and the PRA is narrowly tailored, being neither underinclusive nor overinclusive, the PRA satisfies strict scrutiny.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted.

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March 25, 2010

REPLY BRIEF

No. 09-559

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners*

v.

Sam Reed et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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April 20, 2010

Corporate Disclosure Statement

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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Argument

Corruption and intimidation in elections threaten self-government. Washington facilitates intimidation by mandating public disclosure of petition signers despite an absent or weak anti-corruption (or other) interest. This unconstitutionally burdens core political speech. (*See* Pet'rs' Br.)

Respondents Reed, Washington Families Standing Together ("WAFST"), and Washington Coalition for Open Government ("WCOG") spend 180 pages without refuting this controlling analysis.[1] They argue instead that this as-applied challenge is facial, petition signing isn't speech, associating and providing information to the government waive First Amendment privacy regarding general-public disclosure, serious burdens on core political speech merit reduced scrutiny, and interests incapable of limitation justify any disclosure Washington imposes.

I. Public Disclosure Here Implicates First Amendment Protections.

Respondents argue at length that "signing a petition is a legally operative legislative act, not speech." (Reed's Br. 22.) But the fact that speech and association might have some legislative effect[2] would not make them mere mechanical acts lacking speech and

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[1] Given considerable duplication on key analytical points, citations will be made primarily to Reed's brief, with citation to others when unique and important points are raised.

[2] The notion that petition signers are just legislators seconding motions (Reed's Br. 26-28) fails because single signatures yield no such effect and parliamentary procedure doesn't control referenda.

association content. (Pet'rs' Br. 17-23.) Moreover, the First Amendment also protects against the compelled speech comprising—and the privacy violation and intimidation resulting from—the general-public *disclosure* of petition signing. (Pet'rs' Br. 23-39.) In this challenge to the Public Records Act ("PRA") *as applied* to petition sheets, both the signing and the disclosure are at issue.

This Court rejected an argument like Respondents' in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Regarding speech and association*, the lower court had held that "contribution[s] and expenditure[s] . . . were conduct, not speech, . . . rel[ying] upon United States v. O'Brien, 391 U.S. 367 (1968)." 424 U.S. at 15-16. *Buckley* held that contributions and expenditures "simply cannot be equated with such conduct as destruction of a draft card." *Id.* at 16. Though "[s]ome forms of communication made possible by . . . the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two . . . [,] the dependence of a communication on the expenditure of money . . . [does not] introduce a nonspeech element . . . or . . . reduce . . . exacting scrutiny . . . ." *Id.* So here it matters not whether legislative conduct is involved because speech, compelled speech, and association are present, and the dependence of speech and association here on petition-signing formalities does not introduce a nonspeech element or reduce the scrutiny. And if contributions to candidates are speech and association, *id.* at 20-23, then signing referendum petitions promoting public *issues* is speech and association. *Regarding disclosure*, *Buckley* clearly applied a First Amendment privacy analysis to the general-public disclosure of contributions and expenditures because "compelled disclosure,

in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64.[3]

This Court has already held that the petition-signing "discussion" is "core political speech," which "discussion" includes signing. (Pet'rs' Br. 17.) The government remains unable to show why the discussant on one side of a petition sheet is engaged in First Amendment speech while the discussant across the sheet is not, and why the signature—integral to and goal of the discussion—is not part of that protected discussion. (*Id.*) Reed attempts a showing. First, he creates a straw man, i.e., Respondents' "primary argument is that . . . everything connected with circulating petitions is core political speech." (Reed's Br. 30.) Respondents made no such argument. Second, Reed

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[3] Respondents argue that there is no expectation of privacy (*See* WAFST's Br. 29.) Under *FOIA*, "expectation of confidentiality is relevant." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). But FOIA employs a "balancing" analysis, *id.* at 1189, not a constitutional analysis. *Glickman* avoided the First Amendment challenge by rejecting disclosure under FOIA. *Id.* at 1187 & n.8. *Glickman*'s petition-signers may have been aware of FOIA, but that did not waive privacy protection. Petition-signers here may have been aware of PRA, but that does not waive privacy. In both cases, the information had not been released to the general public when privacy was asserted. In *Glickman*, requesters faced FOIA's balancing test. Here, requesters face stringent constitutional standards. They must prove adequate interests and tailoring to overcome a strong right. While an expectation of privacy may be relevant to the Fourth Amendment, it plays no part in *Buckley*'s privacy analysis. And privacy involves selective information release (Pet'rs' Br. 36 n.35), so petitioners may choose disclosure to allies and government yet assert privacy against general-public disclosure.

argues that "the core political speech is the interactive communication," and signing is neither "expressive" nor "interactive." (*Id.* at 31.) His argument regarding "expressive" is premised on the error that speech with some possible legislative effect is not speech. *See supra*. His argument regarding "interactive" excises the key act of interaction—accepting the solicitation. That acceptance, stated in a signature bespeaking consent and support, is the circulator's goal, the discussion but his means. The signer does not break her interaction to sign elsewhere. She responds to the solicitor, takes his sheet (perhaps borrowing his pen), reviews language atop the form (perhaps asking questions about the referendum), signs the petition, provides required information, decides whether to provide her email (perhaps asking about its use), hands back the sheet, and likely continues the protected discussion a bit before departing (perhaps wishing her new associate success). Even if only "interactive" speech and association were all the First Amendment protects, which is not so, that vignette is *all* "interactive." And her signature has meaning. It speaks support for putting the issue to a vote and likely for the referendum's success.[4]

Reed argues that "signing a petition is simply part of the election process, not expressive conduct. (Reed's Br. 28.) Reed points to *Burdick v. Takushi*, 504 U.S. 428 (1992), for the proposition that, since the goal of candidate elections is winnowing out non-chosen

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[4] Reed cites a manual suggesting voters will sign unattended sheets. (Reed's Br. 33.) There is no evidence for that here, but if it were done the written elements of interaction remain and are protected unless writing is to be excluded from the First Amendment.

candidates, the "function of signing a petition is to winnow out . . . measure[s] that will [not] make the ballot." While the process of referendum qualification in total is removing those lacking support, the signature of the *individual* signer is to endorse the issue being put to a vote, regardless of whether it makes the ballot. And Reed loses sight of the issue, which is whether First Amendment conduct is involved. Even if winnowing is the goal, that does not mean that there is no speech and association. *Burdick* acknowledged that even in the *candidate* context, the First Amendment association right was at issue and the burden had to be properly justified. *Id.* at 434 ("rigorousness of our inquiry . . . depends upon the extent . . . [of] burden[on] First and Fourteenth Amendment rights"). While *Burdick* only recognized an association right because the case involved write-in votes for *candidates*, where an *issue* is involved, as here, a petition signer not only associates with those seeking to qualify a referendum for vote but also identifies herself with the issue, which is speech. In any event, the *disclosure* of petition signers clearly implicates First Amendment privacy interests, *see supra*, so this case is distinguishable from *Burdick*.

Respondents have been unable to escape the horns of the dilemma posed by the implications of two kinds of language atop the petition forms and two possible signing motives. (Pet'rs' Br. 20-22.) "[I]f people signed just to put the issue on the ballot without expressing a view on the merits, then the State's cognizable interest vanishes, . . . but if they indicated their voting preference, the secret-ballot privacy interest protects against public disclosure." (Pet'rs' Br. 21.)[6] Reed argues that

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[6] Reed says this argument is not properly before the Court

"[e]ven assuming such a right," the "[h]ighlights" portion of the petition form did not indicate how signers would vote and the neutral statutory language might have caused some to sign just to put the measure on the ballot. (Reed's Br. 25-26 n.4.) This leaves Respondents atop the horns. Merely *asserting* that the "[h]ighlights" language did not indicate how a signer would vote does not make it so, as Reed fails to address the actual language. (*See* Pet'rs' Br. 21 (language inviting response indicating position on referendum).) And Reeds' assertion that some just signed to put the referendum on the ballot merely restates one horn. (Reed's Br. 25-26 n.4.) As to these, any informational interest vanishes. As to those responding affirmatively to the "[h]ighlights" language, the secret-ballot interest engages. So Washington cannot compel disclosure of either and therefore of any.

Respondents lean heavily on the notion that petition signers have already disclosed their identity and belief. (Reed's Br. 33.) But if they ***already*** made their identity, association, and belief public, why seek the ***same*** under PRA? Petition signers have ***not*** made disclosure to the general public or those making PRA requests. Respondents' concept of the privacy interest is flawed. It conflicts with this Court's: "[P]rivacy encompasses the individual's *control* of information concerning his or her person. In an organized society, there are *few facts* that are *not* at one time or another

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because one horn of the dilemma is argued for the first time here. (Reed's Br. 25 n.4.) But the First Amendment claim is "properly presented," so "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010) (quotation marks and citations omitted).

divulged to another." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989) (emphasis added). "[W]e deal *not* with an interest in *total* nondisclosure but with an interest in *selective* disclosure." *Id.* at 763 n.14 (emphasis added). Washington's scheme imposes three levels of compelled speech that must each be justified, and only general-public disclosure poses the privacy loss and intimidation risk at issue here. (Pet'rs' Br. 35-39.) So disclosure to other petition signers, possible potential petition signers,[6] petition circulators, petition sponsors,[7] the Secretary and staff, and canvass monitors neither waives the selective assertion of privacy as to other disclosure nor poses the loss of privacy and risk of intimidation inherent in disclosure to the general public.[8]

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[6] There is no evidence of non-signers recording signers' information, disclosing same, or intimidating signers. Such a possibility is not before the Court but would waive no privacy. WAFST's assertion that such recording non-signers comprise a "much larger number" (WAFST's Br. 25) is without evidence and likely untrue because those opposing the topic of the petition-circulator's solicitation would seem less likely to engage the solicitor and review a petition.

[7] The fact that petition sponsors may make some other use of petition-signers' identity, (Reed's Br. 34-35), changes nothing about whether the First Amendment is involved and whether signers have waived privacy rights against general-public disclosure because the political-association right protects internal sharing of identity and information and pursuing common goals.

[8] The practice of other states is irrelevant because practice does not determine constitutionality. And the lawyerly practice of distinguishing cases on irrelevant points, in which Respondents engage at length in their briefs (on this point and

II. This Is an As-Applied Challenge Requiring Strict Scrutiny or Its Functional Equivalent.

Is this an as-applied challenge? Reed claims that "Count I . . . presents a facial challenge to the PRA" while "Count II presents an as applied challenge." (Reed's Br. 20-21.) But Count I expressly made an as-applied challenge and sought relief as to referendum petitions, not all PRA applications. (J.A. 16.) So this is an as-applied challenge. If Petitioners prevail, PRA will not be unconstitutional entirely.

Respondents apparently intend by the facial-challenge assertion to impose the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739 (1987). (Reed's Br. 20.) But *Salerno* cannot apply to this as-applied challenge, and the "substantial overbreadth" test of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), applies in First Amendment facial challenges.

Respondents also intend to make "discussion of harassment . . . not relevant to this facial challenge," trying to limit its relevance to Count II. (Reed's Br. 21.) But this attempted manipulation of the claims does not make harassment evidence irrelevant to Count I because it clearly applies to irreparable harm and the balance of equities, as this Court recognized in staying broadcasting of the California Proposition 8 trial. (Pet'rs' Br. 55-56.) And the privacy right provides protection against intimidation (Pet'rs' Br. 29), making intimidation efforts relevant to both the privacy right (Count I) and the intimidation exemption (Count II). (Pet'rs' Br. 26-35.)

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elsewhere), does not alter the controlling analytic principles for which Petitioners have cited cases.

Does strict scrutiny or its functional equivalent apply? Petitioners argue that it does because petition-signing is core political speech in itself and an essential element in the protected petition-signing discussion, *see supra*, because PRA as applied is not viewpoint neutral[9] and is content based, because compelled general-public disclosure of identity, association, and belief seriously burdens the First Amendment privacy right, and because even on a sliding exacting-scrutiny scale the burdens are sufficiently high to make exacting scrutiny the functional equivalent of strict scrutiny. (Pet'rs' Br. 40-48.)

Respondents insist on intermediate scrutiny under *O'Brien*, 391 U.S. 367. (Reed's Br. 37.) Petition-signing is core political speech, *see supra* Part I, so *O'Brien* does not apply.

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[9] Petitioners argued viewpoint discrimination because, while both supporters and opponents of a referendum make *financial* disclosures, only those opposing the government's position are subject to the additional disclosure at issue here. (Pet'rs' Br. 41-42.) Reed does not address this (Reed's Br. 38 n.5). WAFST argues that this is not properly before the Court, but that is readily answered by the *Citizens United* quote in note 5, *supra*. WAFST then sidesteps the *as-applied* issue in this case to respond that any public records identifying proponents of the legislation would have to be disclosed. This resort to a higher level of generality does not address the problem, which is that only those *opposed* to the government must make the extra disclosure at issue here. Viewpoint neutrality requires the disclosure of those who oppose the petition circulation. WAFST's further argument that absent disclosure referendum sponsors "gain an advantage" of "unfettered access to the signed petitions" (WAFST's Br. 48) has no effect on the constitutional analysis because such access to internal information is simply a function of protected political association.

Moreover, both petition-signing and *disclosure* of petition-signers are at issue in this as-applied challenge. Reed makes no response to *Buckley*'s protection for *disclosure* of identity, association, and belief, 424 U.S. at 64, and to the heightened exacting scrutiny for *disclosure* under the sliding scale in *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008), under which Petitioners demonstrated that the burden is heavy so exacting scrutiny must be the functional equivalent of strict scrutiny.[10] (Pet'rs' Br. 42-48.) WAFST makes a partial and flawed response by arguing that "the right of association is irrelevant" because petition signers may not know each other. (WAFST's Br. 49-51.) The response is partial because First Amendment privacy protects identity and belief, not just association. The response is flawed because WAFST sees no association unless it is somehow like NAACP's. But *Buckley* recognized that even a *contribution* to a candidate is protected by the association right, 424 U.S. at 64. Few of Barack Obama's myriad contributors could claim a private, confidential association with him, yet *Buckley* says there was association. So a petition signature was

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[10] Reed highlights the delay between interactive communication and disclosure. (Reed's Br. 57) (*citing Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 188-89 (1999) ("*Buckley-II*")). But the Court applied exacting scrutiny to, and noted the substantial burdens of, contribution disclosure in *Buckley* despite delay between speech and disclosure. 424 U.S. at 64-68. The delay played a role in *Buckley-II* but was not dispositive. *Id.* at 191 n.10, 198-99 (affidavit requirement not before Court). The state interests, perhaps compelling as to the affidavit requirement, did not justify the name-badge requirement. *Id.* at 198-99. Washington's interest in disclosure of petition-signers is likewise nonexistent or anemic.

enough to establish association. And there was clearly personal association between the signers and petition circulators, agents of the sponsors. And some petition signers voluntarily provided an email address to facilitate communication within their association. The Sponsors had a website on which signers could also associate with them. Those who associate online would be shocked to learn that they have not actually associated if WAFST is correct. But government may no more condition First Amendment protection on *how* we associate than on how we speak. *See, e.g., FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 ("*WRTL-II*") (controlling opinion) ("a speaker has the autonomy to choose the content of his own message").

WAFST argues for a reasonable time, place, and manner standard because a petition is a non-public forum. (WAFST's Br. 40-42.) This sort of argument was dispatched in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which said that, while states were not obliged to elect judges, having chosen to do so they must abide by the First Amendment in conducting elections. *Id.* at 788. States are not required to allow referenda, but if they do, they must do so under the First Amendment.

Respondents and the Ninth Circuit rely on *Burdick*, 504 U.S. 428, for a balancing standard where election-process statutes are challenged. (*See, e.g.*, Reed's Br. 28.) As shown above, the correct standard here is strict scrutiny or its functional equivalent under exacting scrutiny. But even *Burdick*'s scrutiny increases where First and Fourteenth Amendment burdens are high, 504 U.S. at 434, as they are here. *Burdick* was about candidate write-in voting and recognized First Amendment protection for association rights (but not speech

rights) for that. The present case about associating to put a public *issue* to a vote, involves speech in a way that candidate voting did not. And because Washington mandates disclosure with little or no cognizable interest—thereby violating rights of privacy and against intimidation—the constitutional burden is severe. So even under *Burdick*, scrutiny would have to be high.

Finally, in applying the correct scrutiny, it is important to frame the issue properly. Reed frames the issue in terms of a "right to anonymous speech." (Reed's Br. i.) Petitioners frame the issue in terms of "the First Amendment right to privacy in political speech, association, and belief." (Pet'rs' Br. i.) Respondents must not be permitted to reframe the question presented. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), this Court applied strict scrutiny to a statute requiring identifying disclaimers on communications and found this disclosure was "more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. [FECA] regulates only candidate elections, not referenda or other issue-based ballot measures." 424 U.S. at 356. *McIntyre* held that Mrs. McIntyre had a right to remain anonymous as to putting disclaimers on her handbills. There was debate between the majority and dissent as to whether there is a general right to anonymous political speech, but that issue need not be resolved here. Simply applying the requisite high scrutiny resolves this case in favor of Petitioners, whether or not there is a general right to anonymous political speech. Here, in light of Washington's absent or minimal interest in violating privacy and compelling speech by forcing general-public disclosure of petition-signers' identity, association, and belief, Washington

may simply not do so. That *outcome* might be described as saying that petition signers have a right to anonymous speech in the form of petition signing, but the outcome derives from standard, high-level First Amendment scrutiny, not from any "right to anonymous speech."

III. Asserted Interests Are Inadequate.

Buckley provided guidance on possible state interests in disclosure. 424 U.S. at 66-68. Two are unique to candidate elections and inapplicable to petition signers. (Pet'rs' Br. 48.) The remaining informational interest cannot justify disclosing petition-signers' identity because it is neither compelling nor important. (Pet'rs Br. 49-50.) Respondents' other interests are anemic or non-existent.

Respondents advance informational and anti-fraud interests.[11] (Reed's Br. 39-48.) However, Respondents provide no evidence that either is compelling or that PRA addresses either in a direct and material way. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("must do more than simply posit the existence of the disease sought to be cured").

Respondents assume PRA is an election regulation designed to prevent fraud and provide voters with information. (Reed's Br. 39-48.) That PRA may affect elections in some roundabout way does not make it so. History and attempted application of PRA to petition signers illustrate Respondents' error.

Referenda were authorized in 1912. (WCOG's Br. 9.) The election code contains numerous regulations

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[11] Transparency and accountability are not separate interests, but derive from Respondents' primary interests.

pertaining to referenda, but none requires public disclosure of petitions. *See* RCW § 29A.72.010 et seq.

The overwhelming authority is that the election code prohibits release of petitions. In 1938—again in 1956—the Attorney General issued a formal opinion that petitions are not subject to disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956).

After adoption of PRA, the Secretary declared petitions remained exempt from disclosure. A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (CP-App. 67a.). A court confirmed that opinion. *Neale v. Kramer*, No. 48733, Order Enjoining Examination of Initiative 282 Petitions (Wash. Sup. Ct. Thurston County, Sept. 14, 1973). And each opinion was drafted with full knowledge of the challenge provision. *Infra* at 15 n.14.

Respondents suggest that petitions are "routinely" released, but history tells a different story. (Reed's Br. 6.) Since 1912, the Secretary has received 1,601 referendum and initiative petitions and certified 107.[12] *Eight* were publicly released, all since 2006, and none were placed on the Internet by the State, or anyone else.[13] And as noted, two attorney-general opinions, an

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[12] Secretary, State Initiatives and Referendums 1914-2009, available at http://wei.secstate.wa.gov/osos/en/InitiativesandReferenda/Pages/StatisticalSummary.aspx.

[13] Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets). Since PRA, 1,172 initiative and referendum were filed, 108 certified, and eight disclosed. (WCOG's Br. 11.)

official statement of the Secretary, and a court opinion opposed disclosure.

Washington's referenda power appears healthy—ranking fourth on the all-time list of statewide referendum use with no or little access to referendum petitions. (Br. of Amici Direct Democracy Scholars 10-11.) The regulatory regime, which has not historically released petitions, adequately serves any anti-fraud or informational interest.

The integrity of the election process is protected by the election code without PRA. The Secretary canvasses and certifies petitions. RCW § 29A.72.230. Referenda proponents and opponents may observe but are prohibited from recording names. RCW § 29A.72.230. The Secretary's determination may be challenged in court, but the provision does not require public access to petitions.[14] RCW § 29A.72.240. And the Secretary is efficient at detecting any fraud through traditional methods (signature comparison), public disclosure playing no part. *See Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000).

Washington's regulatory regime also addresses any informational interest without PRA. Referendum sponsors register with the campaign finance commission *before* filing notice of the referendum. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Secretary, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step is registration with campaign finance commission).

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[14] The challenge provision has operated for nearly 100 years without public access to petitions. *See* RCW § 29.79.210 (1965); Laws 1913, ch. 138 § 17 p. 427.

Reporting requirements continue during the circulation period and subsequent campaign. *Id.*

Furthermore, Respondents failed to prove that petition-signature fraud is a problem.[15] *See Turner*, 512 U.S. at 664 (must do more than posit existence of disease). The election-code, which does not rely on public disclosure of petitions, sufficiently protects the integrity of the election process. *Washington Initiatives Now*, 213 F.3d at 1139.

Attempting to avoid this lack of evidence, Respondents cite cases from other jurisdictions.[16] Many involve rejection of petitions for statutory deficiencies unrelated to petition-signature fraud.[17] *See Roberts v. Priest*, 975 S.W.2d 850 (Ark. 1998) (889 excess signa-

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[15] It is incorrect to rely on election fraud unrelated to petition signatures. For example, PRA cannot logically address "'illegal votes'—including votes cast by felons and votes cast on behalf of deceased electors." (Br. of Amicus State of Ohio et al. 21.) The solution must address the problem in a direct and material way.

[16] Respondents failed to introduce any evidence below of petition signature fraud, or evidence that public release of petition signatures is likely to detect fraudulent signatures. They cite, for the first time in their opposition briefs, cases from other jurisdictions.

[17] Ohio commits the same error in its amicus brief. (Br. of Amicus State of Ohio et al. 21-22.) Ohio also cites two cases involving Ralph Nader and suggests Nader was denied ballot access because of petition-signature fraud. (*Id.* at 23-24.) The cases involved prohibitions on out-of-state petition circulators, not petition-signature fraud. *See Nader v. Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459, 463-67 (6th Cir. 2008). Each state failed to prove prohibiting out-of-state circulators constitutional. *Nader v. Brewer*, 531 F.3d at 1038; *Nader v. Blackwell*, 545 F.3d at 476.

tures, 1,506 rejected for statutory deficiencies, only 241 alleged fraudulent); *Citizens Comm. for D.C. Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics*, 860 A.2d 813 (D.C. 2004) (circulator affidavits); *State v. Pappas*, 424 N.W.2d 604 (Neb. 1988) (circulator affidavits); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006) (out-of-state circulators); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006) (out-of-state circulators).

And Reed has conceded that petition-signature fraud may be related to per-signature compensation arrangements that create incentives. Ralph Thomas, *Bills Would Change the Way Signature Gatherers are Paid*, The Seattle Times, Jan. 27, 2007 (*available at* http://community.seattletimes.nwsource.com/archive/?date=20070127&slug=initiatives27m). Washington has not charged anyone with such fraud. *Id.* And the solution to any such problem is to attack the incentives—not public disclosure of petitions.

Respondents also failed to prove that public disclosure of eight initiative petitions released since 2006 led to the detection of any fraudulent signature.

PRA is not designed to serve the asserted interests. *Turner*, 512 U.S. at 664 (must demonstrate regulation will *in fact* alleviate harms in *direct* and *material* way). PRA is passive. Information is disclosed only if requested. The burden is on the requestor to disseminate the information. If PRA served an anti-fraud or informational interest it would require disclosure of all petitions, not just those requested. *See Republican Party of Minnesota*, 536 U.S. at 780 ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

Contrast PRA with an election regulation designed to serve compelling state interests. The campaign-finance statute requires financial reports at regular intervals, *see, e.g.*, RCW § 42.17.065, and Washington disseminates the information. *See* Wash. Admin. Code 390-14-026 (reports online within two days). If PRA were an election regulation designed to address the Respondents' asserted interests it would do the same. Yet less than *one-half of one percent* of petitions have been released, and R-71 would be the first publicized on the Internet.[18] The numbers demonstrate that PRA is not designed to serve fraud or informational interests.

Public disclosure is also unnecessary to serve any fraud interest. A voter concerned that his name erroneously appears on the petition need only check *his* name. Washington could implement a system similar to its system for checking voter registration. *See* Secretary, *MyVote: Personalized Voter Information*, http://wei.secstate.wa.gov/osos/VoterVault/Pages/MyVote.aspx. The system requires name and birthday for access, reducing the invasion of privacy to individual voters. *Id.* There is no need to place all 138,000 names on the Internet for the world to see. And placing the names on the Internet without such protections invites harrassment of petition-signers and fraud from opponents seeking to prevent the referendum from qualifying.[19] *See* Press Release, VoteonMarriage.org,

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[18] Considering only petitions filed after PRA, only *seven-tenths of one percent* have been released. *Supra* 14 n.13.

[19] Washington provides no mechanism for signers to remove signatures from petitions. States that do so generally require requests to be made *before* petitions are filed. *See, e.g.*, Alaska Stat. § 15.45.120; Ariz. Rev. Stat. Ann. § 19-113.

VoteonMarriage.org Cites MassEquality with Identity Theft and Fraud; Challenges False Allegations (Jan. 26, 2006) (available at http://voteonmarriage.org/news.shtml#060109pr) (reporting fraudulent removal requests).

This concern is currently unfolding in Utah. Utah amended its law to allow petition signers to remove their names up to one month after a petition is filed. Utah Code Ann. § 20A-7-205 (2009) (*amended by* 2010 Utah Laws Ch. 225 (S.B. 275)). Many fear public disclosure will invite harassment and intimidation to encourage petition signers to recant.[20] Josh Smith, *Utah Gov. Gary Herbert Signs Controversial Signature-Removal Bill*, Deseret News, Mar. 29, 2010. And the change, effective immediately, appears directed at an ethics petition currently being circulated.[21] *Cathy McKitrick, Suit Demands Secrecy for Ethics Petition Signers*, The Salt Lake Tribune, Apr. 15, 2010. A Republican Party official indicated any signer is unfit to run as a Republican. *Id.* Public disclosure of referendum petitions chills speech because it is impossible to predict what may be the next "controversial" issue. Here it is same-sex marriage, more recently, healthcare reform, and today, an ethics-reform petition.

And Respondents have been unable to escape the horns of the dilemma posed by the language atop the

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[20] Utah also removed the notary requirement from the signature removal statute, Utah Code Ann. § 20A-7-205 (2009), raising concerns about fraudulent removal requests.

[21] On April 15, a federal court temporarily restrained release of petitions. *Utahns for Ethical Government v. Barton et al.*, No. 2:10-cv-00333 (D. Utah 2010). A preliminary injunction hearing is scheduled for April 28, 2010. *Id.*

petition forms and possible signing motives.[22] *Supra* 5-6. Do petition signers (1) support the repeal of the law, (2) simply indicate they would like a public election to be held, or (3) simply sign to avoid any further discussion with a petition circulator? *See* Br. of Amici Direct Democracy Scholars 16 (third motive). The uncertainty surrounding what signatures represent cannot support the informational interest.

Moreover, the interest in providing voters with information is not absolute. *See McIntyre*, 514 U.S. at 348. This Court has not yet ruled whether compelled disclosure resulting in marginal informational gains (e.g., small contributions) is constitutional.[23] *Buckley* 424 U.S. at 84. The Ninth Circuit correctly decided that disclosure of de minimis contributions or expenditures is not permissible because the informational interest is not designed to advise the public who might generally favor or oppose referenda absent a cognizable *financial* commitment. *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1032-33 (9th Cir. 2009). Here, the burden on petition-signers' privacy of speech, association, and belief greatly exceeds the marginal information gain disclosure provides.

Moreover, Respondents may not dictate the subject and scope of debate. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). The power to decide

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[22] Respondents create a dilemma of their own, discounting PRA's burdens by arguing that criminal penalties are sufficient to deter harassment and intimidation, (Reed's Br. 53.), but arguing that criminal penalties are insufficient to deter petition-signature fraud. (*Id.* at 43.)

[23] (Pet'rs' Br. 51 (petition signers are like de minimis contributors).)

what information is relevant and to be compelled is the power to control speech, and the power knows no bounds. Respondents admit that "phone numbers, voting history, age, marital status, race, income, and other demographic information . . . provide useful information about participation in the political process." (Reed's Br. 48.) May Washington compel such information? Under Respondents' analysis it could. This proves the unconstitutionality of an open-ended informational interest because it not only violates privacy of identity, association, and belief, but such demographic information threatens to convert a public *issues* debate into class, race, and religious warfare.

Alarmingly, Respondents also assert an interest in promoting conversations between opponents and petition signers. (Reed's Br. 45, 47.) These are confrontations. (Pet'rs' Br. 2-7.) The informational interest does not lie in enabling such confrontations but in providing information about referenda. There is no constitutional authority to force the disclosure of some citizens' identity, association, and belief so others can confront them in intimidating ways. These confrontations chill speech and political participation.

The identity of petition signers provides no cognizable information and cannot justify disclosure.

IV. Public Disclosure Is Inadequately Tailored.

Petitioners addressed PRA's lack of tailoring above, and in Petitioners' opening brief. (Pet'rs' Br. 51-53.)

V. Petitioners Properly Received a Preliminary Injunction.

This Court should apply *Winter v. Natural Resources Defense Council*, 129 S. Ct. 265 (2008), in the First Amendment context to "ensure that the First Amendment rights this Court has zealously guarded from governmental interference retain their status as fundamental rights." (Br. of Amicus Liberty Counsel 4 (applying preliminary-injunction factors in First Amendment context).) Petitioners had likely success on the merits. *Supra*; (Pet'rs' Br. 16-53).

Respondents ignore the remaining preliminary injunction factors and declare "harassment . . . not relevant." (Reed's Br. 21-22.) But this Court considers harassment relevant to irreparable harm. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 712 (2010) (harassment demonstrates irreparable harm).

Respondents themselves make harassment relevant by arguing that *Burdick* applies. (Reed's Br. 28-29.) *Burdick*, 504 U.S. at 434 (rigor of review varies with burden on rights). It is also relevant under *Davis v. FEC*, 128 S. Ct. at 2775, which requires the functional equivalent of strict scrutiny with high burdens. That Respondents prefer to ignore PRA's harmful consequences does not make harassment irrelevant.

Harassment also demonstrates how technology altered disclosure. While modern technology makes disclosure "rapid and informative," *Citizens United*, 130 S. Ct. at 916, there are unforeseen consequences. Technology threatens deep First Amendment wounds absent restraint. (*See* Br. of Amici Comm. for Truth in Politics et al. (technology increases burdens).) Disclosure reports, once residing in practical obscurity, are now combined with maps offering satellite views of

donors' homes. *See* www.eightmaps.com. An amicus candidly admits it seeks petition-signers' identity for "employment decisions." (Br. of Amicus Am. Bus. Media et al. 14.) This is far from an interest in "plac[ing] . . . candidate[s] in the political spectrum more precisely than . . . on the basis of party labels and campaign speeches." Sunlight, championed as the best of disinfectants, threatens the cancer of intimidation to speakers absent appropriate protection. The harassment and intimidation illustrate the substantial and irreparable harm imposed by PRA.

Harassment and intimidation also balance equities for Petitioners. *See Hollingsworth*, 130 S. Ct. at 712. (*See also*, Pet'rs' Br. 56-57.)

Finally, public interest favors a preliminary injunction. Disclosure of petition-signers' identity cannot help citizens decide to sign a petition because it occurs *after* the petition is submitted. If signatures are merely a collective command to hold an election, as Respondents assert, disclosure cannot help voters decide how to vote in the election. If the signatures indicate how individuals would vote, disclosure infringes their right to privacy and a secret ballot.

The informational interest in *Buckley* is not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792 ("[A]ny danger that the people cannot evaluate the information and argument advanced . . . is . . . contemplated by the Framers . . . ."). Disclosure of petition-signers' identities threatens to prevent the debate from even occurring, and the First Amendment must promote, not discourage, public debate of issues.

Conclusion

Petitioners properly received a preliminary injunction, the Ninth Circuit should not have overturned it, and the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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PROTECT MARRIAGE WASHINGTON,
Petitioners,

v.

SAM REED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF *AMICUS* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in defending these freedoms, and who have a right to express those views through this nation's political process. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and organizations being harassed for expressing their viewpoints in the political arena.

ADF has advocated for the rights of Americans to exercise their religious beliefs and to express those beliefs in the political arena. ADF has been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Agostini v. Felton*, 521 U.S. 203 (1997).

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

ADF contends that the potential for intimidation and harassment of petition signers increases when the government releases signers' identifying information to the public. Fear of harassment at the hands of pressure groups, which publish the identifying information on the Internet and encourage confrontation with signers, discourages people from signing petitions. As signing a petition is a form of political speech protected by the First Amendment, compelling disclosure of the identifying information operates as a restraint on political speech. The Washington Public Records Act ("PRA") restrains protected speech by compelling disclosure of petition signers' identities. Strict scrutiny should be used to evaluate the application of PRA to the referendum process. The District Court correctly applied this legal standard when granting the injunction. Further, release of signers' identifying information offends the senses in the same way that making a citizen's vote public does, reflecting our nation's history and traditions of anonymous participation in the political process. Accordingly, any application of Washington's PRA to compel the disclosure of signatures gathered in the referendum process violates the First Amendment and should not be permitted.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT PETITION SIGNATURES ARE CORE POLITICAL SPEECH. SUCH SPEECH IS SUBJECT TO STRICT SCRUTINY.

The rights to political speech, free association, and petitioning of the government are core, fundamental rights that include the right to exercise these rights in anonymity. These rights have been accorded specific protections throughout this nation's history and are essential to the functioning of a democratic society. Any government act that operates as a limitation on these rights is subject to strict or exacting scrutiny and can be upheld only if it is narrowly tailored to serve a compelling or overriding state interest.

A. The First Amendment Protects The Fundamental Rights of Free Speech, Association, and Petitioning the Government.

Throughout its history, this Court has consistently extolled the virtues and necessity of vigorously preserving the First Amendment's protections regarding freedom of speech and association. "The liberty of opinion keeps governments themselves in due subjection to their duties." *Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233, 247-48 (1936) (quoting Erksine's Speeches 525 (High's ed.)). The fundamental right of free speech "reflects the belief of the framers of the

Constitution that exercise of the right[] lies at the foundation of free government by free men." *Schneider v. Irvington*, 308 U.S. 147, 161 (1939). "There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise through its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede." *Thomas v. Collins*, 323 U.S. 516, 543 (1945). Inherent in the right to free speech are the rights of freedom of association and assembly. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

This Court has long recognized that political speech, in particular, lies at the core of these "indispensable" and "great" freedoms. *Thomas*, 323 U.S. at 529-30; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995) (recognizing that political advocacy, even anonymous advocacy, of politically controversial viewpoint on referendum issue "is the essence of First Amendment expression"). "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment Freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

Our form of government is built on the premise that every citizen shall have the rights to engage in political expression and association and to petition the government. These rights are enshrined in the

First Amendment. "The Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). Accordingly, this Court has been, and always should be, "extremely reticent to tread" on the liberty of political expression. *Id.*

B. The Court Has Long Protected the Right to Exercise First Amendment Rights Anonymously.

An integral part of the freedoms of speech, association, and petition is the right of the speaker to choose to maintain his or her anonymity. *McIntyre*, 514 U.S. at 342; *Talley*, 362 U.S. at 62; *NAACP*, 357 U.S. at 462. "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342. Historically, pamphlets and leaflets have been "'weapons in the defense of liberty.'" *Talley v. California*, 362 U.S. 60, 62 (1960) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). Some of these "weapons" were either signed with pseudonyms or submitted anonymously; indeed "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the

progress of mankind." *See id.* at 63 n.3, 64. Patriots from the Revolutionary War era concealed their authorship or distribution so as to avoid potential prosecution; the writer of the Letters of Junius is still unknown; and even the Federalist Papers were published without disclosing the authors' true identities. *Id.* at 65.

History has shown that "it is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.* *See generally Citizens United v. FEC*, ___ U.S. ___, 175 L.Ed.2d 753, 871-72 (2010) (Thomas, J., concurring in part, dissenting in part) (emphasizing "'right to anonymous speech'"); *McIntyre*, 514 U.S. at 358-71 (Thomas, J., concurring) (recounting historical underpinnings for anonymity right). In fact, "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *McIntyre*, 514 U.S. at 342.

A vital relationship exists between the freedom of association and *privacy* in those associations, and the government generally cannot compel group members to be publicly identified. *See NAACP*, 357 U.S. at 462-66; *Talley*, 362 U.S. at 65; *Bates v. City of Little Rock*, 361 U.S. 516 (1960). "[W]hether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter." *Gibson v. Fla. Legis. Investigation Comm'n*, 372

U.S. 539, 570 (1963) (Douglas, J., concurring). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462. "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley*, 362 U.S. at 65. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 64.

Under the First Amendment, this Court has protected the rights of both individuals and groups to anonymously distribute campaign literature. *See McIntyre*, 514 U.S. at 351-52. The Court has also protected the rights of an organization to anonymously distribute literature announcing an economic boycott over equal employment opportunities for minority groups, *see Talley*, 362 U.S. at 61.

Moreover, this Court and lower federal courts applying *NAACP* and its progeny have held that the First Amendment protects against forced disclosure of past political activities because such disclosure has a chilling effect on participation in the political process. Such protected activities include, among other things, attending political meetings, discussing common political views and goals with like-minded persons, strategizing about public-policy stances, evaluating possible legislation, and *petitioning* government officials to influence public policy. *See, e.g., DeGregory v.*

Attorney Gen. of N.H., 383 U.S. 825, 828-29 (1966) (individual investigated for subversive activities could refuse to disclose political associations, meetings attended, and views and ideas expressed at such meetings because the "realm of political and associational privacy protected by the First Amendment" was not overcome by a compelling state interest); *Pleasant v. Lovell*, 876 F.2d 787, 795 (10th Cir. 1989)) (protecting from disclosure advocacy concerning modification to tax laws); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 384, 388 (D.C. Cir. 1981) (protecting documents related to "political expression and association," including communications regarding decisions to support or oppose political candidates); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 413-14 (D. Kan. 2009) (protecting confidential communications regarding legislative affairs and lobbying efforts); *Wyoming v. USDA*, 208 F.R.D. 449, 452, 454 (D.D.C. 2002) (protecting documents regarding regulations sent or received from government officials or other advocacy groups, meetings or conversations regarding regulations, reports or notes related to advocacy groups, and daytimers or diaries related to political activities); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1 (D.D.C. 2002) (protecting from disclosure "political demonstration activities . . . , including dates, locations and a detailing of 'all action' related to demonstration activities"); *Austl./E. U.S.A. Shipping Conf. v. United States*, 537 F. Supp. 807, 810 (D.D.C. 1982), *vacated as moot*, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986) (quashing civil investigative demand due to

chilling effect on First Amendment activities where government sought documents regarding "petitioning the government," including protests filed with administrative agencies).

C. The First Amendment Protects Against the Compelled Public Disclosure of the Petitions at Issue.

If the First Amendment protects against the compelled disclosure of activities *that relate to petitioning* the government and other political activities, as shown above, it surely also protects against the compelled disclosure of the petitions themselves. Forced public disclosure of the petitions in this lawsuit would not only reveal the *identity* of the signers, it would also make known the signers' *political activity*—that is the activity of petitioning the state government to put a referendum on the ballot and the position that the signers almost certainly will take in the referendum. Relying on Washington's statutory scheme for referendum qualification, which does not permit public release and dissemination of the petitions, the signers undoubtedly expected that they were participating in relative anonymity, with their identity being known only to the few like-minded individuals whose signatures appeared on the same page, the state verification official, and the direct proponents and opponents of the referendum.

The act of signing this type of petition implicates multiple First Amendment rights, including free speech, association, and petitioning the

government. This Court has held that persons have a right to participate in these protected activities in anonymity, if they so choose. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. The Petitioners have clearly indicated a desire to have their identities, speech, associations, and political activities remain anonymous. This Court should honor this desire and expectation of anonymity by upholding the values of the First Amendment and the precedents of this Court.

II. PUBLISHING PETITION SIGNERS' IDENTIFYING INFORMATION WILL DISCOURAGE PARTICIPATION IN THE POLITICAL PROCESS.

The purpose underlying the Constitution's protection of an individual's right to maintain anonymity in speech is no less prominent today than in other periods of our nation's history where important social and political issues were being debated and decided. The adverse consequences that may result from the voicing of one's political expression are just as likely today as they have been at any time in this nation's history. One has to look no further than recent election cycles for real-world examples of the reprisals which have been exacted on persons who have done nothing more than exercise their constitutionally protected right to express their political opinions, reprisals which appear to become more and more likely as

the tools to quickly and comprehensively transmit information continue to develop.

The examples below demonstrate a "reasonable probability" that the compelled public disclosure of the identities of the petition signers would chill First Amendment activity by subjecting them to "threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). In showing the reasonable probability of a chilling effect on First Amendment freedoms, one may "offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.*

Opponents of some initiative petitions have targeted individuals who merely attempted to collect the required number of signatures in order to place a measure on a ballot. In 2006, signature gatherers for the Tax and Spending Control ("TASC") initiative petition filed a lawsuit against Nevadans for Nevada, a group formed to oppose the ballot measure. Molly Ball, Tax and Spending Control Backers' Foes Get Physical, Las Vegas Rev. J., June 7, 2006. (Appendix 1)[2]. The lawsuit alleged that opponents intimidated petition signers, blocked access to petitions, and poured soda over the petitions. *Id.* That lawsuit resulted in a court order commanding workers for Nevadans for Nevada to abide by a set of rules that would allow the TASC group to collect signatures. Carri

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[2] The appendices referenced herein are attached to, and submitted with, this brief.

Geer Thevenot, Judge Chides Ballot Groups, Las Vegas Rev. J., June 9, 2006. (Appendix 2).

In 2006, in Truro, Massachusetts, Leo Childs' bid for reappointment to the board of fire engineers was denied, in part, because Childs signed a petition against same-sex marriage. KnowThyNeighbor.org, Petitioner Signer Denied Reappointment to Local Board, *available at* http://knowthyneighbor.blogs.com/home/2006/04/petition_signer.html?cid=16496447 (last visited on March 3, 2010). Defending his vote, Selectman Paul Asher-Best said "There are a lot of households in Truro headed by gay and lesbian people, and I just need to make sure that they're going to have equal protection and not have people who are biased against them in charge of public safety situations." *Id.* Asher-Best became aware that Childs had signed the petition through the list of petition signers on the website KnowThyNeighbor.org. *Id.* The KnowThyNeighbor.org website indicates on its front page that Washington is "[u]p [n]ext," if this Court lifts the injunction and permits disclosure of signers' names. KnowThyNeighbor.org, *available at* http://knowthyneighbor.org/ (last visited on March 3, 2010).

Earlier this year, in West Linn, Oregon, Mary Ann Mattecheck chose not to send in over 1,500 signatures to recall three city councilors, because she was worried about the consequences to the signers. Elizabeth Hovde, *Worried about Retaliation, Campaign Backer Keeps Signatures to Herself*, The Oregonian, February 8, 2010,

available *at* http://www.oregonlive.com/hovde/index.ssf/2010/02/worried_about_retaliation_camp.html (last visited on February 25, 2010). While collecting signatures, Mattecheck received intimidating phone calls. *Id.* Additionally, one signer requested that Mattecheck remove his name from the petition for fear of the adverse impact on his business or his family. *Id.*

Several recent examples of persons suffering from retributive acts for political speech come from California. Proposition 8 was a ballot proposal for a state constitutional amendment, confirming the definition of marriage as being between a man and a woman. Cal. Const. art. 1, § 7.5. The California Government Code requires any committee that supports or opposes a ballot measure to disclose the name, address, and employer of any individual who makes a contribution to that committee in an amount over $100. Cal. Gov't Code §84211. The same code requires the California Secretary of State to post that information on the Internet. *Id.* §§ 84600–12. Activists used the personal information disclosed by the California Secretary of State to harass individuals who opposed the activists' point of view.

Many persons who contributed to organizations that supported the passage of Proposition 8 have suffered greatly as a direct result of the disclosure of their donation. Examples of retributive acts against donors in favor of the measure are prevalent and widespread. John R. Lott & Bradley Smith, Donor Disclosure Has Its Downsides, Wall St. J., December 26, 2008 (Appendix 3).

Supporters of Proposition 8 have been subjected to threatening and harassing phone calls, emails, and postcards. *See ProtectMarriage.com v. Bowen*; 599 F. Supp. 2d 1197, 1201-04 (E.D. California 2009) Some of the phone calls and emails have been accompanied by death threats. *Id.* One such message relayed to a supporter "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter....I've also got a little surprise for Pasor [sic] Franklin and his congregation of lowlife's [sic] in the coming future . . . . He will be meeting his maker sooner than expected . . . . If you thought 9/11 was bad, you haven't seen anything yet." *Id* at 1200.

Churches and religious organizations have also been targeted for their support of Proposition 8. *Id.* at 1201-04. Two temples owned by the Church of Jesus Christ of Latter-day Saints and a Knights of Columbus facility received envelopes containing a suspicious white powdery substance. *Id.* Similarly, Bash Back!, a homosexual activist group, noisily disrupted a worship service at Mount Hope Church near Lansing, Michigan by shouting and throwing pro-gay flyers. Church Sues Homosexual Activists for Disrupting Service, The Associated Press, May 14, 2009, *available at* http://www.onenewsnow.com/Legal/Default.aspx?id=529214 (last visited on March 3, 2010). The group was protesting what Bash Back! members called the church's "anti-queer agenda." *Id.*

These intimidation tactics only add to already existing fears of retaliation for expressing one's

opinion, seen in a recent Massachusetts poll "[t]hirty-six percent of all Massachusetts voters agreed with the statement, 'Some people I know personally would be reluctant to admit they oppose gay marriage because they would worry about the consequences for them or their children.' (Twenty-four percent agreed strongly)." Maggie Gallagher, *Five Years After Goodridge: Gay Marriage Divides Massachusetts Voters*, National Organization for Marriage, May 17, 2009, *available at* http://www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=7000219 (last visited on March 3, 2009)

Although much retaliation has come in the form of personal attacks and threats, the retribution has come in economic form as well. *See* Lott & Smith, Donor Disclosure Has Its Downsides. Scott Eckern, director of the nonprofit California Musical Theater in Sacramento, and Richard Raddon, director of the L.A. Film Festival, were both forced to resign from their jobs after their employers were targeted for protests and boycotts because of the individuals' campaign donations to "Yes on 8," the committee established to advocate for the passage of Proposition 8. Likewise, a Californian store owner who personally donated money to ProtectMarriage.com — Yes on 8, displayed a yard sign, and made phone calls on behalf of the campaign received retaliation because of the owner's personal support for Proposition 8 and the subsequent compelled posting of that support. *ProtectMarriage.com;* 599 F. Supp. 2d 1197, Decl. of [John Doe #1] in Support of Plaintiffs' Motion for Preliminary Injunction, ¶¶ 2-27 (Appendix 4).

Fliers referencing the owner's support of Proposition 8 were posted on cars parked in the store's parking lot, the store was picketed twice, harassing phone calls were made, and efforts were undertaken to cause persons to boycott the store because of the owner's personal support of Proposition 8. *Id.* at ¶¶ 8, 10–15. Additionally, Facebook groups have been created urging persons to boycott the store, a sponsored link on Google was purchased and the website referenced the owner's donation and urged a boycott, and negative reviews were posted on other websites based only on the store owner's personal donation to Proposition 8, made known through the donor-disclosure laws. *Id.* at ¶¶ 10–14.

Similarly, a boycott was organized against El Coyote, a California restaurant where Margie Christoffersen was a manager, when it was revealed that Christoffersen donated one hundred dollars in support of Proposition 8. Steve Lopez, *Prop. 8 Stance Upends Her Life*, Los Angeles Times, Dec. 14, 2008, *available at* http://articles.latimes.com/2008/dec/14/local/me-lopez14 (last visited on Feb. 25, 2010). Activists wrote scathing reviews about the restaurant on various websites, and police had to break up a riotous group of protestors who were shouting at restaurant customers. *Id.* El Coyote had to cut the hours of restaurant employees, as business became uncharacteristically slow. *Id.*

The harassment to which supporters of Proposition 8 have been subjected goes beyond economic acts, extending to property damage and

physical violence. For example, in November 2008, someone used a "Yes on 8" yard sign, which was posted on property owned by a Lutheran Church, and a heavy object to break a large window on the church building. *ProtectMarriage.com;* 599 F. Supp. 2d 1197, Decl. of [John Doe #3] in Support of Plaintiffs' Motion for Preliminary Injunction, ¶¶ 9-16 (Appendix 5). Churches owned by the Church of Jesus Christ of Latter-day Saints have been vandalized, one of which had the words "No on 8" spray painted upon it. Adrienne S. Gaines, Radical Gay Activists Seek to Intimidate Christians, Charisma Magazine, Nov. 19, 2008, *available at* http://www.charismamag.com/cms/news/archives/111908.php (last visited Dec. 5, 2008) (Appendix 6). Other churches were egged and toilet-papered, had a window broken, marquee vandalized, flags stolen, and adhesive poured onto a doormat, keypad, and window. *Id.* Other businesses' buildings were spray painted with messages like "Prop H8TE." Vandals Spray Paint Signs in Downtown Fullerton, Orange County Register, Oct. 20, 2008, *available at* http://www.ocregister.com/articles/macdonald-one-police-2200383-paint-vandals# (last visited Dec. 5, 2008) (Appendix 7).

There have been many acts of physical violence relating to support given for Proposition 8. A group participating in a prayer walk was accosted by a crowd of individuals that threw hot coffee on and pushed group members. Gaines, Radical Gay Activists Seek to Intimidate Christians, Charisma Magazine, Nov. 19, 2008. One individual was hit with a Bible, pushed to the ground, and kicked. *Id.* The group's leader was threatened with death. *Id.*

A 69-year-old Palm Springs woman was allegedly pushed and spit on by protestors opposing Proposition 8. *Id.*

The harassment has become so severe that some of the contributors to the "Yes on 8" committee filed a lawsuit in federal district court to have their names removed from the California Secretary of State's website. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1197. The committee alleges that supporters of Proposition 8 have been subjected to threats, harassment, and reprisals for their support of Proposition 8. *Id.* at 1200. The reprisals were well-coordinated and were solely designed to punish the supporters of Proposition 8 for exercising their respective freedom of speech and association. In fact, opponents of Proposition 8 have gone so far as to establish a website that is designed to identify supporters of Proposition 8 and encourages donations to the website in order to "take action" against those that supported Proposition 8. *See* http://www.californiansagainsthate.com. There is also a website that plots the disclosed names, addresses, occupations, and employers of purported Proposition 8 supporters on a Google street map with the language: "Proposition 8 changed the California state constitution to prohibit same-sex marriage. These are the people who donated in order to pass it." *See Prop. 8 Maps*, http://www.eightmaps.com (last visited March 4, 2010).

This brief discussion of recent reprisals exacted upon persons as a result of the exercise of their free-speech rights is indicative of the heated nature

of political debate and of the tensions inherent within the political process. When disclosure requirements subject political participants—participants who would rather act anonymously—to the types of retaliation described above, there is indeed "cause for concern." *Citizens United v. FEC*, ___ U.S. ___, 175 L. Ed. 2d 753, 802 (2009). These examples should serve to remind this Court of the reasons why the First Amendment's protections have always extended to protecting one's right to choose to voice his or her opinion, especially one of a political nature, anonymously. They should serve also to remind the Court of the need to guard against any weakening of these protections.

III. THE STATE CAN SATISFY ANY VALID INTERESTS IN ENSURING THE INTEGRITY OF THE REFERENDUM PROCESS JUST AS IT DOES IN ENSURING THE INTEGRITY OF ELECTIONS – THROUGH MEANS THAT DO NOT INFRINGE FIRST AMENDMENT RIGHTS.

The Ninth Circuit lightly dismissed the chilling effect that the public identification of those who signed a referendum petition could have on participation in Washington's referendum process. The court reasoned that only an "incidental effect" would occur by "deterring some would-be signers from signing petitions." *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009). The court identified two "important government interests" that were furthered by the PRA. The first identified interest was that of preventing fraud or "preserving the

integrity of the election by promoting government transparency and accountability." *Id.* at 679. ADF concedes that this is a legitimate government interest, but publishing the names of petition signers is not a narrowly tailored method of pursuing the anti-fraud interest. The second purported interest was that of "providing Washington voters with information about who supports placing a referendum on the ballot." *Id.* at 679. This purported interest simply is not a valid one, any more than it could be said to exist in the context of any other political speech, including the actual casting of a ballot.

Exposing petition signers to harassment by publicly identifying them is not narrowly tailored to advance the government's fraud prevention interest in light of the many mechanisms currently in place to prevent fraud that do not require one's anonymity rights to be violated. The mechanisms states use to prevent voter fraud can also prevent petition fraud without restricting the individuals' freedom to choose to do so anonymously. In fact, Washington currently uses similar fraud prevention techniques to monitor elections and petition drives. For example, Washington allows referendum proponents and opponents to observe the canvassing of petition signatures. *See* Wash. Rev. Code § 29A.72.230. Similarly, representatives of major parties may be present to observe the voting at polling places during elections. *See* Wash. Rev. Code § 29A.44.410. Similar canvassing techniques are used to ensure the authenticity of votes cast and petitions signed. *See* Wash. Rev.

Code § 29A.72.230 (explaining canvassing of petition signatures) and Wash. Rev. Code § 29A.60.

The Ninth Circuit argues that publishing the names of petition signers allows the public to detect fraud and respond to it by challenging the certification of the petition in court. *See Doe v. Reed*, at 680. But the fraud-prevention interest is already served sufficiently by the existing – far less chilling – mechanisms listed above. Moreover, most forms of petition fraud (and election fraud) depend on inaccurate voter registration rolls to succeed. Publishing the names of petition signers does not significantly advance the public's ability to prevent fraud when checking for inaccurate voting rolls is already possible. The voter registration rolls are public record and can be reviewed for errors without disclosing whether a voter signed a petition. *See* Wash. Rev. Code § 29A.08.720 ("Subject to the restrictions of RCW 29A.08.710 and 40.24.060, poll books, precinct lists, and current lists of registered voters are public records and must be made available for public inspection and copying under such reasonable rules and regulations as the county auditor or secretary of state may prescribe").

The techniques used to prevent election fraud are sufficient to satisfy the government's anti-fraud interest in the petition context. Exposing petition signers to harassment by publicly identifying them is not narrowly tailored to advance the government's fraud prevention interest.

The second purported interest was that of "providing Washington voters with information about who supports placing a referendum on the ballot." *Id.* at 679. This purported interest simply is not a valid one, any more than it could be said to exist in the context of any other political speech, including the actual casting of a ballot. Our nation's traditions are based upon the freedom to express one's viewpoint, especially those of a political nature, and to do so anonymously, if we so choose. *See McIntyre*, 514 U.S. at 343 ("respected tradition of anonymity in the advocacy of political causes . . . is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliations"). Accordingly, there can be no legitimate governmental interest in providing the registered electorate information about how other members of the registered electorate intend to vote. To say otherwise is akin to saying that the government has a legitimate interest in providing afternoon ballot-casters with identifying information (name, address, and how the individual cast his or her vote) of the morning ballot-casters.

CONCLUSION

Amicus Alliance Defense Fund respectfully requests that this Court reverse the judgment of the Ninth Circuit, and reinstate the preliminary injunction granted by the District court.

Respectfully submitted,

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March 4, 2010

APPENDIX

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APPENDIX 1

Jun. 07, 2006
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TAX AND SPENDING CONTROL: Backers: Foes get physical

Supporters sue, allege intimidation

Swarming around signature-gatherers. Yelling and grabbing clipboards. Pouring a can of soda on a petition.

Such are the intimidating tactics circulators of the Tax and Spending Control ballot initiative petition allege are being used against them by a union-backed group.

On Tuesday, TASC's backers filed a lawsuit against Nevadans for Nevada, the group they allege has overstepped legal bounds to block the petition from getting on the ballot.

"The tactics of the blockers are a clear violation of the law," TASC's executive director, Bob Adney, said at a news conference Tuesday. "They're trying to silence people's voices."

He said the blockers' tactics might prevent TASC from getting the 83,156 valid voter signatures needed to get on the ballot.

Nevadans for Nevada Chairman Danny Thompson denied the allegations.

"We are not harassing them," he said. "All we are doing is exercising our First Amendment rights, just like they are. We don't use physical tactics."

Thompson said the petitioners were failing in their signature-gathering and seeking someone to blame.

"If they were successful in getting signatures, they wouldn't be suing our organization for exercising our rights," said Thompson, who also heads the state AFL-CIO.

The TASC initiative aims to amend the Nevada Constitution to limit the government's ability to spend money.

Its signature-gatherers, posted outside Department of Motor Vehicles offices, grocery stores and other high-traffic spots in the valley, have been the target of a first-of-its-kind effort in Nevada. The petition-blocking group has deployed its own workers at the same locations to hand out leaflets encouraging people to "Read the Fine Print and Decline to Sign!"

TASC's backers, in their lawsuit, allege that the petition-blockers, who they call "hired thugs," did more than hand out leaflets.

The lawsuit accuses the blockers of "illegally impeding and preventing" signatures from being

gathered "by intimidation, threats, coercion, violence, restraint, and/or undue influence."

As someone was signing the TASC petition, the lawsuit alleges, blockers approached TASC signature-gatherer Nichole Dickens and put their own papers on top of her clipboard. The blockers stood very close to the signer, talking loudly over Dickens, "thus confusing and intimidating the potential signer," who responded by walking away, the lawsuit alleges.

The lawsuit said such actions are illegal under a Nevada statute that prohibits "intimidation of voters" and that specifically mentions petitions.

"Whether or not we make it (onto the ballot) is not the issue," TASC's attorney, Joel Hansen, said. "The issue is, can petitioners gather in peace, or do they have to be intimidated and harassed?"

The lawsuit seeks a restraining order against the petition-blockers and a six-week extension of the June 20 petition deadline for TASC to make up for the time the lawsuit said the signature-gathering effort has been impeded.

It is scheduled for a Thursday hearing in Clark County District Court.

TASC also filed a complaint with the secretary of state's office calling for criminal charges to be filed against the petition-blockers.

The case echoes another case in which Hansen was involved. Two years ago, Hansen was the lawyer for Nevadans for Sound Government, which sued government entities including the DMV and the University of Nevada for preventing petitioners from gathering signatures on public property.

A judge ruled in the group's favor and gave an extension to the petitions, which aimed to repeal the 2003 tax increase and prohibit public workers from serving in the Legislature. But the two initiatives still did not make the ballot.

"This time it's not government interference, it's government employees' unions," Hansen said. "They are only going after our petition because they don't want this petition (TASC) to succeed."

Adney said: "Now we know the lengths to which the politically privileged will go to try to stop this. It scares them to death. All these unions have a vested interest in growing government, raising taxes and increasing spending."

Adney said the blockers' efforts had caused petitioners to become discouraged and gather fewer signatures or quit, meaning TASC had to spend more money on its signature-gathering.

Thompson said the accusations against Nevadans for Nevada, a coalition that includes several unions including teachers, police and firefighters, were implausible.

He said the group's workers were trained according to a strict set of guidelines that prohibit intimidation.

According to a memorandum provided by the group, the petition "educators" are specifically told not to block anyone's path, follow people or vehicles or "engage in harassing, threatening or abusive conduct."

The memo said, "Communications that are respectful will be more effective in carrying the message."

Thompson said his workers' only objective was to give people the facts before they signed the petition.

The union, which previously filed a lawsuit challenging the way TABOR is explained on petitions, contends the fine print of the lengthy proposed constitutional amendment contains hidden provisions that people would not like if they knew about them.

"This is an important public policy issue," Thompson said. "Somebody should be saying, 'Hey, take a look at this before you sign.'"

APPENDIX 2

Jun. 09, 2006
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Judge chides ballot groups

Petition backers, foes agree to rules

A group of petition circulators and their opponents agreed to abide by a set of ground rules Thursday after a judge lectured them about First Amendment rights and common courtesy.

"What we have to do is we all have to get along, and we cannot have people harassing each other," District Judge Sally Loehrer told the parties during an afternoon hearing.

The matter came before Lochrer after the Committee for Tax and Spending Control filed a lawsuit Tuesday against a union-backed group called Nevadans for Nevada.

TASC, which is gathering signatures for a ballot question designed to limit government spending, alleged the opposing group had used intimidating tactics to deter voters from signing its petition.

Petition circulators have been working outside Department of Motor Vehicles offices, grocery stores and other high-traffic spots in the valley, and Nevadans for Nevada has deployed its own workers at the same locations to hand out leaflets

encouraging people to "Read the Fine Print and Decline to Sign!"

TASC's lawsuit sought a restraining order against the petition-blocking group, which denied engaging in harassment, and a six-week extension of the June 20 petition deadline.

TASC needs 83,156 valid voter signatures to get its question on the November ballot.

Loehrer refused to grant the extension request and said TASC had waited too long to bring the matter to court.

During Thursday's hearing, representatives of both groups agreed to abide by the following rules, which Loehrer incorporated into a court order:

- Neither the petition circulators nor their opponents may yell or use bullhorns.
- No representative of either group may touch the opposing group's supplies or agents.
- Neither group may have more than four workers at any location.
- No more than two representatives of either group may approach a voter at one time.
- If representatives of one group approach a voter first, representatives of the other group must remain at arm's length and not interrupt their conversation.

"Common courtesy says that when one person is speaking to another, another doesn't come up and butt in," Lochrer said.

Attorney Richard McCracken, who represents Nevadans for Nevada, initially opposed the so-called "first-in-time, first-in-right" rule.

"There's no constitutional requirement that one party stay silent because the other is speaking," the lawyer said.

He said the petition opponents need to approach voters before they sign their names, but Loehrer said the opponents can provide the voters with a form authorizing the removal of their signatures and deliver it to the Clark County clerk's office for them.

Gary Peck, executive director of the American Civil Liberties Union of Nevada, observed the hearing and said a court-ordered "first-in-time, first-in-right" rule would have been unconstitutional.

"The First Amendment doesn't say you're free to speak your mind unless you're being rude," Peck said.

But he said the parties can agree to play by a set of rules, as they did at Thursday's hearing.

Bob Adney, TASC's executive director, said that he thinks the new rules will allow his group to gather the necessary signatures by the deadline.

APPENDIX 3
Donor Disclosure Has Its Downsides

By John R. Lott Jr.
And Bradley Smith

How would you like elections without secret ballots? To most people, this would be absurd. We have secret balloting for obvious reasons. Politics frequently generates hot tempers. People can put up yard signs or wear political buttons if they want. But not everyone feels comfortable making his or her positions public -- many worry that their choice might offend or anger someone else. They fear losing their jobs or facing boycotts of their businesses.

And yet the mandatory public disclosure of financial donations to political campaigns in almost every state and at the federal level renders people's fears and vulnerability all too real. Proposition 8 -- California's recently passed constitutional amendment to outlaw gay marriage by ensuring that marriage in that state remains between a man and a woman -- is a dramatic case in point. Its passage has generated retaliation against those who supported it, once their financial support was made public and put online.

For example, when it was discovered that Scott Eckern, director of the nonprofit California Musical Theater in Sacramento, had given $1,000 to Yes on 8, the theater was deluged with criticism from prominent artists. Mr. Eckern was forced to resign.

Richard Raddon, the director of the L.A. Film Festival, donated $1,500 to Yes on 8. A threatened boycott and picketing of the next festival forced him to resign. Alan Stock, the chief executive of the Cinemark theater chain, gave $9,999. Cinemark is facing a boycott, and so is the gay-friendly Sundance Film Festival because it uses a Cinemark theater to screen some of its films.

A Palo Alto dentist lost patients as a result of his $1,000 donation. A restaurant manager in Los Angeles gave a $100 personal donation, triggering a demonstration and boycott against her restaurant. The pressure was so intense that Marjorie Christoffersen, who had managed the place for 26 years, resigned.

These are just a few instances that have come to light, and the ramifications are still occurring over a month after the election. The larger point of this spectacle is its implications for the future; to intimidate people who donate to controversial campaigns.

The question is not whether Prop. 8 should have passed, but whether its supporters (or opponents) should have their political preferences protected in the same way that voters are protected. Is there any reason to think that the repercussions Mr. Eckern faced for donating to Prop. 8 would be different if it were revealed that instead of donating, he had voted for it?

Indeed, supporters of Prop. 8 engaged in pressure tactics. At least one businessman who donated to "No on 8," Jim Abbott of Abbot & Associates, a real estate firm in San Diego, received a letter from the Prop. 8 Executive Committee threatening to

publish his company's name if he didn't also donate to the "Yes on 8" campaign.

In each case, the law required disclosure of these individuals' financial support for Prop. 8.

Supposedly, the reason for requiring disclosure of campaign contributions is to allow voters to police politicians who might otherwise become beholden to financiers by letting voters know "who is behind the message." But, in a referendum vote such as Prop. 8, there are no office holders to be beholden to big donors.

Does anyone believe that in campaigns costing millions of dollars a donation of $100, or even $1,000 or $10,000 will give the donor "undue" influence? Over whom? Meanwhile, voters learn little by knowing the names and personal information of thousands of small contributors.

Besides, it is not the case that voters would have no recourse when it comes to the financial backers of politicians or initiatives. Even without mandatory disclosure rules, the unwillingness to release donation information can itself become a campaign issue. If voters want to know who donated, there will be pressure to disclose that information. Possibly voters will be most concerned about who the donors are when regulatory issues are being debated. But that is for them to decide. They can always vote "no."

Ironically, it has long been minorities who have benefited the most from anonymous speech. In the 1950s, for example, Southern states sought to obtain membership lists of the NAACP in the name of the public's "right to know." Such disclosure would have destroyed the NAACP's financial base

in the South and opened its supporters to threats and violence. It took a Supreme Court ruling in *NAACP v. Alabama* (1958) to protect the privacy of the NAACP and its supporters on First Amendment grounds. And more recently, it has usually been supporters of gay rights who have preferred to keep their support quiet.

There is another problem with publicizing donations in political elections: It tends to entrench powerful politicians whom donors fear alienating. If business executives give money to a committee chairman's opponent, they often fear retribution.

Other threats are more personal. For example, in 2004 Gigi Brienza contributed $500 to the John Edwards presidential campaign. An extremist animal rights group used that information to list Ms. Brienza's home address (and similarly, that of dozens of coworkers) on a Web site, under the ominous heading, "Now you know where to find them." Her "offense," also revealed from the campaign finance records, was that she worked for a pharmaceutical company that tested its products on animals.

In the aftermath of Prop. 8 we can glimpse a very ugly future. As anyone who has had their political yard signs torn down can imagine, with today's easy access to donor information on the Internet, any crank or unhinged individual can obtain information on his political opponents, including work and home addresses, all but instantaneously. When even donations as small as $100 trigger demonstrations, it is hard to know how one will feel safe in supporting causes one believes in.

Mr. Lott, a senior research scientist at the University of Maryland, is the author of "Freedomnomics" (Regnery, 2007). Mr. Smith, a former Federal Election Commission commissioner, is chairman of the Center for Competitive Politics and professor of law at Capital University in Columbus, Ohio.

APPENDIX 4

John Doe #1

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* *Pro Hac Vice Application Pending*
** Designated Counsel for Service

United States District Court
Eastern District of California

ProtectMarriage.com, *et al.,* *Plaintiffs,*	Case No. 2:09-CV-00058-MCE-DAD **DECLARATION OF** [REDACTED] **IN**

v. Debra Bowen, *et al.*, *Defendants.*	**SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: TBD Time: TBD Judge England

I, REDACTED, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the state of California over 18 years of age, and my statements herein are based on personal knowledge.

2. I supported the passage of Proposition 8.

3. In support of the passage of Proposition 8, I donated $XX,XXX to ProtectMarriage.com – Yes on 8.

4. I own REDACTED, a local REDACTED store REDACTED in the Counties of REDACTED, REDACTED, and REDACTED. I have a total of REDACTED stores in this area.

5. My donation to ProtectMarriage.com – Yes on 8 was a personal one, but because one has to list an employer, I had to list the name of my business since I am self-employed.

6. In support of the passage of Proposition 8, I placed a yard sign in the front yard of my home.

7. In support of the passage of Proposition 8, I also made phone calls on behalf of the Proposition 8 campaign with a group of people from my church.

8. In October 2008, someone put flyers on all the cars in the parking lot of my REDACTED store. These fliers referenced my support of Proposition 8 and my financial contribution.

9. I believe that, because I was required to provide the name of my business when I made my personal donation to ProtectMarriage.com – Yes on 8, and because this information was made available to the public, my stores have been targeted for various forms of harassment.

10. On the social networking website of Facebook, at least three "groups" have been formed urging boycotts of REDACTED (Boycott REDACTED, Boycott REDACTED, and Boycott REDACTED – Equality for All!!!). As of January 9, 2009, one of these groups had over 160 members.

11. Someone started REDACTED and for a portion of November 2008, paid for it to be a sponsored link on Google. What this means is that, when one searches for my company on websites that show Google's sponsored links, REDACTED is

the first website that appears on the list of sponsored links.

12. The website REDACTED makes reference to my personal donation in support of Proposition 8 and urges people to boycott my stores on the basis of my support

13. On Yelp.com, a website featuring reviews of local businesses and restaurants, several negative reviews of my stores have been posted. None of the reviews have anything to do with my business, but instead reference my donation to ProtectMarriage.com – Yes on 8.

14. Various other websites have published negative reviews of my stores based solely on my donation to ProtectMarriage.com – Yes on 8.

15. Since the passage of Proposition 8, my REDACTED store has been picketed twice.

16. On November XX, 2008, there was a march in opposition to Proposition 8 in downtown REDACTED. The REDACTED Police Department called and informed me that they had received information that the protestors planned to march to my REDACTED store and picket there.

17. Several of the protestors who came to the REDACTED store on November XX, 2008 were fairly aggressive. They stood in front of the entrance to the store and attempted to give flyers to my customers stating that they should not shop

at my stores because of my donation to Proposition 8. A true and correct copy of the flyer distributed by the picketers is attached to this Declaration as Exhibit A.

18. Several people arrived and were fairly aggressive. They stood in front of the entrance to the store and attempted to give flyers to my customers stating that they should not shop at my stores because of my donation to Proposition 8.

19. The second time that my REDACTED store was picketed, several people assembled in front of the entrance to the store and tried to get my customers to sign some sort of petition.

20. The manager of the store told the protestors they could not block the entrances and exits of the store. The protestors refused to leave.

20. We called the REDACTED Police Department and asked them to ask the protestors to move to the sidewalk, since they were standing in front of the entrances and we believed they were trespassing, because the store is located on private property.

21. The REDACTED Police Department told me that the store is a public place and that the protestors were not trespassing. The Police Department refused to ask the protestors to relocate to the sidewalk.

22. After the passage of Proposition 8, an individual came into my [redacted] store, filled a shopping cart with groceries, and took it to the check-out line. Once the cashier had scanned in all of the items in the shopping cart, the individual announced that he was not going to buy anything because I supported Proposition 8, and left without paying for the items.

23. I have retained many but not all of the letters and hundreds of e-mails that my stores or I received because of my support of Proposition 8.

24. My stores received numerous harassing phone calls that referenced my support of Proposition 8.

25. Around 30-40 people have walked into my stores since the passage of Proposition 8 and expressed their displeasure about my support of Proposition 8.

26. Because of my concerns about product tampering in light of my support of Proposition 8, I have been forced to install an additional sixteen security cameras in my stores to protect the integrity and safety of our products.

27. These experiences will hinder me from donating to a cause similar to Proposition 8 in the future. I feel very strongly about the issue of same-sex marriage, but in the future I would support a measure like Proposition 8 more discretely and would not donate like this again. I feel it is very unfair that I could not make my donation a personal matter only and leave the name of my business out. As a result of my personal donation, my stores and my employees have been subject to harassment, and I feel this is not right.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on: _____

_____

REDACTED

APPENDIX 5

John Doe #3

James Bopp, Jr. (Ind. State Bar No. 2838-84)*
Barry A. Bostrom (Ind. State Bar No. 11912-84)*
Sarah E. Troupis (Wis. State Bar No. 1061515)*
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* *Pro Hac Vice Application Pending*
** Designated Counsel for Service

United States District Court
Eastern District of California

ProtectMarriage.com, *et al.*, *Plaintiffs,*	Case No. 2:09-CV-00058-MCE-DAD **DECLARATION OF** REDACTED **IN**

v. **Debra Bowen, *et al.*,** ***Defendants.***	**SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: TBD Time: TBD Judge England

I, REDACTED, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the state of California over 18 years of age, and my statements herein are based on personal knowledge.

2. I supported the passage of Proposition 8.

3. I am the pastor REDACTED of Lutheran Church in REDACTED, California.

4. Prior to the passage of Proposition 8, I stated to my congregation that the Bible supports marriage between one man and one woman, and that the members of my congregation should vote accordingly.

5. Prior to the passage of Proposition 8, an unknown person placed a "Yes on 8" yard sign on the church property, which remained standing on the property until sometime on November [redacted], 2008 or November [redacted], 2008.

6. Sometime between 10:00 p.m. on November [redacted], 2008 and 8:00 a.m. on November [redacted], 2008, the "Yes on 8" yard sign that had been placed on the church property and a heavy object, such as a rock, were used to break a large window of our church building. Pictures of the broken window and the "Yes on 8" sign are attached as Exhibit A. These pictures are a true and accurate representation of the broken window and "Yes on 8" sign as I discovered them on November [redacted], 2008.

7. Our denominational newspaper of the Lutheran Church, Missouri Synod, published a story about the incident, which is attached as Exhibit B. This account of the events is a true and accurate representation of the events that occurred.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on: _____

_____

REDACTED

APPENDIX 6

Radical Gay Activists Seek to Intimidate Christians

Since Nov. 4, Christians have reported increased incidences of church vandalism and sometimes-violent attacks for their support of traditional marriage.

[11.19.08] The Nov. 4 passage of constitutional amendments banning gay marriage in California, Arizona and Florida has evoked a sometimes-violent response from radical gay activists who have vandalized churches, mobbed intercessors and disrupted a worship service in Michigan.

Intercessors with a house of prayer in San Francisco said they feared they might be killed Friday night during a routine prayer walk through the area's Castro district, which has a large gay community. They said a crowd who thought they were marriage amendment demonstrators shouted lewd remarks, pushed them, threw hot coffee on their faces and threatened the prayer group leader with death. (See related video.)

One man reportedly hit an intercessor on the head with her Bible before shoving her to the ground and kicking her. Before police arrived, another house of prayer member said someone repeatedly tried to pull his pants down.

"We hadn't preached, we hadn't evangelized," one of the intercessors said after the incident. "We worshipped God in peace, and we were about to die for it."

Police eventually escorted the group to their van, telling the intercessors they had to leave if they wanted to make it out, one witness said.

"These are the nicest kids," said TheCall founder Lou Engle, who knows many of the young intercessors involved in the incident. "That night they were doing only worship. They weren't trying to aggravate anything."

"I think what's happening is an exposure of what's really there and an underbelly of this [radical gay] movement," Engle added. "I think the church has to really reveal what's going on there so the nation gets a clue about what they're making an alliance with."

In Michigan, where voters in 2004 approved an amendment defining marriage as the union of one man and one woman, a Chicago-based gay rights organization called Bash Back interrupted a Nov. 9 service at an Assemblies of God congregation in Lansing. (See related video.)

After staging a demonstration outside Mount Hope Church to draw most of the security staff away from the worship service, protestors masked as congregants stood up in the middle of the service, "declared themselves fags and began screaming

loudly," Bash Back leaders said in a statement posted online.

The protestors pulled the fire alarm and threw thousands of fliers into the congregation, while a gay couple rushed to the front and began kissing in front of the pastor. "Let it be known: So long as bigots kill us in the streets, this pack of wolves will continue to BASH BACK!" the group said in a statement about the incident.

Bash Back leaders said Mount Hope was targeted because it is "complicit in the repression of queers" by working to "institutionalize transphobia and homophobia" through "repulsive" ex-gay conferences and hell house plays, "which depict queers, trannies and womyn [sic] who seek abortions as the horrors."

In a statement posted on Mount Hope's Web site, church leaders said they don't "attempt to identify the church as anti-homosexual, anti-choice, or right wing" but do "take the Bible at face value and believes what the Bible says to be the truth."

Mount Hope spokesman David J. Williams Jr., said the sheriff's department had launched an investigation into the incident. "We're really asking for prayer for the people that did this," Williams said. "They need Jesus; they need to know His love."

Attorney John Stemberger, who chaired Florida's marriage amendment campaign, said many gay

protestors want to intimidate the public into silence. "Their goal is to create an intense climate of intimidation and hostility within the culture to try and deter people from supporting traditional marriage and other pro-family initiatives in the future," Stemberger said. "We will not be bullied into silence, indifference or inaction."

In Palm Springs, Calif., a 69-year-old woman planned to file charges against protesters who reportedly pushed the woman and spit on her during a Nov. 8 rally opposing the passage of Proposition 8, which amends the state constitution to define marriage as the union of one man and one woman. Phyllis Burgess said authorities convinced her to press charges against the attackers.

Nationwide, gay rights advocates protested marriage bans on Saturday, pointing particularly to California's Proposition 8, which defined marriage as between one man and one woman and overturned a state Supreme Court ruling that had legalized gay marriage. Many of the demonstrations were peaceful, according to Associated Press (AP) reports, with participants waving rainbow-colored flags and holding signs saying "Don't Spread the H8."

But pastors across the country, particularly in California, say incidents of vandalism and theft have increased since Nov. 4. One California pastor said a minister in his state received death threats for his support of Proposition 8.
According to reports from California's Protect

Marriage campaign:

· At Messiah Lutheran Church in Downey, Calif., a "Yes on 8" sign was wrapped around a heavy object and used to smash the window of the pastor's office.

· Several "Yes on 8" yard signs were stolen from Calvary Chapel Ventura, as well as a large banner displaying the church's name and service times.

· Park Community Church in Shingle Springs, Calif., received harassing phone calls and has been threatened with lawsuits by Proposition 8 opponents.

· Bloggers targeted Yorba Linda, Calif., pastor Jim Domen, who is open about his past struggle with same-sex attraction, and his girlfriend for harassment after seeing the couple's photo in news reports about the passage of Proposition 8.

· The words "No on 8" were spray-painted on a Mormon church in Orangevale, Calif.

· A brick was thrown through the window of Family Fellowship Church in Hayward, Calif., and at Trinity Baptist Church in Arcata, Proposition 8 opponents vandalized the church's marquee, which encouraged support for the marriage amendment; stole the church's flags; and committed other acts of vandalism totaling $1,500.

· Eggs thrown on the building of San Luis Obispo

Assembly of God and toilet paper was strewn across the property, while a Mormon church in the same city had adhesive poured onto a doormat, a keypad and a window.

The Mormon Church, headquartered in Salt Lake City, Utah, has also become a target of gay rights activists because it provided major funding to the Proposition 8 campaign and encouraged its members to support the marriage amendment, which passed with 52 percent of the vote.

Some gay rights advocates have called for a boycott of the state of Utah, and Bash Back leaders admitted to vandalizing Mormon churches there, as well as in Washington state and California. A Mormon temple in Salt Lake City reported receiving a letter containing a white, powdery substance that forced the facility to close while police launched an investigation.

"The hypocrisy, hatred, and intolerance shown by the gay rights movement isn't pretty," said Randy Thomasson, president of the Campaign for Children and Families, a leading California-based pro-family group. "While claiming to be against hate and for tolerance and choice, the homosexual activists are revealing their hatred of voters and religion and showing their intolerance of people's personal choices to support man-woman marriage. By attacking the people's vote to protect marriage in the state constitution, homosexual activists have declared war on our republic and our democratic system."

Christian leaders say the backlash is likely to continue and may worsen. "It's actually desperation time for us all across the nation to be praying," Engle said. "They're calling [Christians] haters when all they're doing is simply saying there's a higher authority. It's a raging against Christ and His loving, foundational laws. It is becoming an anti-Christ rage. They are creating a Jesus of their own mind, a Jesus who lets everybody do whatever they want.

"I think the church has to be prepared [for religious persecution]," he added. "Our allegiance is to God and His Word, and if that means imprisonment and martyrdom, so be it." -- **Adrienne S. Gaines**

APPENDIX 7

VANDALS SPRAY PAINT SIGNS IN DOWNTOWN FULLERTON
IF CAUGHT, VIOLATORS COULD FACE UP TO ONE YEAR IN PRISON, $10,000 FINE.

By BARBARA GIASONE
The Orange County Register
FULLERTON – Vandals used gold spray paint to scrawl anti-Proposition 8 messages on commercial and residential buildings in the downtown and east Fullerton over the weekend, police said.
The "Prop H8TE" message was found on the Bank of America and Union Bank on north Harbor Boulevard, and on a retail store in the 500 block of north Harbor. Additional tagging was found on houses near Dorothy Lane.
Sgt. Mike MacDonald said anyone caught causing more than $400 in damages is subject to one year in state prison or county jail – and $10,000 in fines. Suspects who are caught causing less than $400 in damages could be charged $1,000 and spend one year in county jail.
In addition to the spray-paint vandalism, 500 "Yes on 8" signs valued at $10 apiece were reported missing throughout the city by a Yes on 8 community organizer, MacDonald said.
At least one resident in the city is using a night-vision camera to catch sign vandals, police said. The homeowner told police he captured images of a woman stealing signs.
"While we respect people's rights to have an opinion on state politics, it's never appropriate to

deface property to further their own beliefs," MacDonald said. "We treat this type of crime very seriously.

"Violators will be prosecuted to the fullest extent of the law," he said.

A resident in the northeast section of the city reported late Monday morning that his property was also defaced with gold paint.

"I've lived in the city for 18 years, and I've never had anything like this," Randy Reece said.

"It's ironic the purveyors of tolerance seem to not have any respect for the First Amendment and it's disgusting," Reece said. "I'd like to have a discussion with them if they want to."

Vandalism should be reported to the Fullerton Police Department at 714-738-6715.

AMICUS CURIAE BRIEF

No. 09-559

In The
Supreme Court of the United States

JOHN DOE #1, ET AL.,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN BUSINESS MEDIA, CONSUMER DATA INDUSTRY ASSOCIATION, FIRST AMERICAN CORELOGIC, INC., THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS, REED ELSEVIER, INC., THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, TRANSUNION, AND THOMSON REUTERS IN SUPPORT OF RESPONDENTS

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Motion for Leave to File Out of Time

Amici respectfully move this Court for leave to file the attached brief out of time. The reason that this brief is being filed out of time is due to a computation error on the part of counsel. Upon learning of that mistake, counsel promptly contacted the clerk's office, which instructed us to file the brief immediately and include this motion. Counsel also promptly contacted the parties to determine whether any of them would object to this filing, and none of them will object. We respectfully request the Court's indulgence.

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IDENTITY OF AMICI CURIAE*

Amici are users and aggregators of a wide array of public record information, including voter registrations and other politically-related information available through public records. Many of *amici's* businesses depend on access to names and other identifying information found in public records.

Amici file this brief because they believe (1) that the Ninth Circuit correctly rejected the proposition that the First Amendment categorically prohibits the disclosure, through state public records acts, of the contents of all "issue" ballot petitions that contain the names of those who have signed the petitions; and (2) that any legitimate First Amendment privacy interests of these petitioners and others similarly situated do not require that overbroad approach, but can adequately be addressed through specific challenges in the small number of situations in which disclosure might create a danger of intimidation or similar harm. The identities of the *amici* are as follows:

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* *Amici* file this brief with the consent of all of the parties. No counsel for a party authored this brief, in whole or in part, and only those entities listed on the cover have contributed financially to its preparation

First American CoreLogic, Inc. collects real estate-focused public records from various government sources throughout the nation. Its publications are used by customers to detect and prevent fraud, improve mortgage transaction efficiency, manage risk, measure the value of residential and commercial properties, identify real estate trends and neighborhood characteristics, and track market performance.

The Consumer Data Industry Association ("CDIA") is an international trade association that represents more than 200 companies that publish databases containing consumer credit and other information for purposes such as the prevention of fraud, the assessment of credit risk, the evaluation of prospective employees and tenants, the location of witnesses and non-custodial parents, and the apprehension of fugitives.

The National Association of Professional Background Screeners represents over 600 pre-employment background screening firms across the United States. Its members provide pre-employment background screening information to employers and the managers of apartment buildings in every state, who use that information to decide whether or not to extend a job offer or to rent an apartment. NAPBS clients are representative of the more than 88% of companies in the U.S. who perform background checks on their employees across the country. Our information products protect employers from liability and ensure that newly hired employees pose no financial risk.

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Thomson Reuters is a leading source of information for businesses and professionals. The Thomson Reuters, Legal business provides access to editorially enhanced case law, statutes, regulations, analytical material and public records at the state and federal levels. Public data collected and used in services provided by Thomson Reuters, Legal include voter registration data, liens and judgments, real property deeds and political donor information. Thomson Reuters, Legal serves customers in the law enforcement, academic and legal professional communities.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly resolved any tension between the First Amendment's right to anonymity and Washington state's public records laws. Historically, this Court has found that once information, including information about identity, is released to the general public, the First Amendment generally requires that it remain public. These principles, when applied to the context of the information's availability in the signature process, effectively moot any claim to anonymity that petitioners may have under the First Amendment.

Even assuming that a First Amendment interest in this identifying information exists, the Ninth Circuit correctly applied intermediate scrutiny to Washington's public records act (PRA). That statute promotes speech, not suppresses it, and is plainly supported by substantial state interests in disclosure. The proper way to resolve this case is not—as petitioners suggest—through a broad constitutional rule through an as applied challenge involving these particular petitioners, not a broad ruling on issue petitions generally.

Access to identifying information contained in both politically and non-politically related public records is critical to amici's ability to produce its products and services that offer important benefits to the public. An overbroad rule, such as that petitioners propose, would result in either delays or unavailability of that information, with potential adverse effects on government, economic, and First Amendment activity.

ARGUMENT

I. Once Information Becomes Public, Its Status as Public Information Cannot be Rescinded.

This Court has repeatedly found that once information—names and similar identifying information—is made available to the public, the government may not withdraw that information from public discourse.[1] In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975), for example, this Court found that a state attempting to protect juvenile privacy could nevertheless not impose sanctions on a television station for republishing the identity of a juvenile offender once that identity had appeared in court records. It makes no difference, moreover, that identity information is publicly available only in a limited area or forum. For example, in *Florida Star v. BJF*, 491 U.S. 524 (1989), the Court held that a state statute criminalizing the publication of a rape victim's name was unconstitutional as applied to a newspaper that acquired the name from a police pressroom, the only place in which the name had been publicly revealed. *See also Smith v. Daily Mail*, 443 U.S. 97 (1979) (newspaper cannot be punished for publishing lawfully obtained name of juvenile offender). *Cf. Bartnicki v. Vopper*, 532 U.S. 514 (2001) (radio

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[1] That "public" status has some limits, but those are not implicated by this case. *Cf. Feist Publ'ns, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 353-54 (1991) (citing *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918)).

station may not be held liable for rebroadcast of information obtained in violation of wiretapping statute).

The identities of signers of petitions in a Washington voter referendum are public within the meaning of the *Cox Broadcasting/Florida Star* doctrine. Those identities are disclosed:

- when a petition is circulated and signed, during which any person asked to sign the petition can view the signature sheet;

- to members of the petitioning organization, which often places those names on its mailing list and which may distribute or sell that mailing list to other organizations;

- during the course of the petition verification process, when the identities of the petition signers are disclosed to those who challenge the validity of the petition; and

- during challenging the validity of the petition, when in litigation the identities are disclosed to challengers and to trial observers.

In each of these contexts, those to whom petition-signers' names are disclosed may publish or otherwise make that identifying information available to others. When identifying information is made available to the public to that extent, the Constitution does not permit the information to be removed from the public's reach.

II. The Ninth Circuit Correctly Rejected the District Court's Decision That Requires the Names of the Signers of All Issue Referendum Petitions Be Kept Secret.

Assuming *arguendo* that, despite the fact that their names have been open to public scrutiny, petitioners have a protectable First Amendment interest in whether their names can be released under Washington's PRA, the Court of Appeals correctly analyzed that interest using intermediate, not strict, First Amendment scrutiny. *See Doe v. Reed (Doe II)*, 586 F.3d 671, 678-80 (9th Cir. 2009). Washington's PRA is a content-neutral regulation designed not to suppress speech, but to serve the public interest in having the contents of public records generally available for public scrutiny. If the application of the content-neutral PRA has an incidental effect on petitioners' First Amendment interests, that effect is subject to intermediate scrutiny review. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). That standard requires that the PRA be narrowly tailored to advance substantial state interests. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Clark v. Community for Creative Non Violence*, 468 U.S. 288,

294 (1984). Washington's PRA clearly meets that intermediate-scrutiny standard.

The reason that states and the federal government have enacted public records laws is because "[s]unlight is said to be the best disinfectant; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (citing L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)). The Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, is premised on that principle. It "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citing S. Rep. No. 813, at 3 (1965)). Like its federal counterpart, the primary purpose of Washington's Open Records Act is to inform political debate and hold the government accountable for its actions. *See Doe II*, 586 F.3d at 674. Washington's citizens "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030. The purpose of the Open Records Act is not only unrelated to the suppression of free expression, it is designed to encourage free expression in that it makes the actions of the government transparent so that voters can debate them and, if necessary, correct them through the political process.

Without public disclosure, the state's interest in promoting the integrity of its election process

would be substantially weakened. *Doe II*, 586 F.3d at 768. Unless there were a right to inspect petition sheets, for example, citizens would not be able to avail themselves of the right to challenge the legal sufficiency of the petition. *See id.* at 679; Wash. Rev. Code § 29A.72.240. Information regarding the identity of the petition signers has additional valuable uses that enrich and inform the political process, such as helping candidates, political parties and citizens supporting ballot propositions contact potential supporters and volunteers. Access to this information helps drive voter participation and education—the very heart of participatory democracy. The application of Washington's PRA to petitions generally is clearly supported by substantial state interests.

III. Any Legitimate Interest In Preserving Anonymity Should be Addressed on a Case-by-Case, Basis, Not By a Rule Excluding the Contents of All Referendum Petitions From Public Records Laws.

The petitioners in this case brought a two-count complaint. The first sought a broad rule that would exclude all referendum petitions from the ambit of public records laws, regardless of the subject addressed by the petition and regardless of whether there was any credible threat that public disclosure of the names on referendum petitions would create any significant danger of harassment. *See Doe v. Reed (Doe I)*, 661 F. Supp. 2d 1194, 1196 (W.D. Wash. 2009). That rule would be enormously overbroad, since a threat of harassment or similar

harm will be present in, at most, a small minority of ballot petition campaigns. Petitioners' second count does not seek a broad rule applicable to all referendum petitions. It alleges that disclosure of the petitioners' identities, because of the particular nature of the ballot proposition involved in this case, subjected petitioners to a danger of harassment, should their names be made public. *See id.* That case-by-case approach, rather than an overbroad exclusion of all referendum petitions, is the appropriate procedure for protecting the interest in petition-signer anonymity that may possibly be present in connection with some ballot-proposition campaigns.

This Court has recognized that the First Amendment may, in certain circumstances, protect against the disclosure of identifying information where a determination is made that disclosure would create a "reasonable probability" of intimidation or similar harm. *See Buckley*, 424 U.S. at 74; *McConnell v. FCC*, 540 U.S. 93,198 (2003); *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). "Although the proof requirements guiding this separate inquiry remain flexible, and direct proof of harm from disclosure is not required, ultimately the [speaker] must prove that the harm to it from disclosure . . . outweighs the governmental interest in disclosure." *Brown v. Socialist Workers Party*, 459 U.S. 87, 115 (1982) (Rehnquist, C. J., O'Connor, and Stevens, J. J., concurring). To the extent that these petitioners can show that they reasonably fear harassment or retaliation as the result of the public records request in this case and that that interest is greater than the government's interest in disclosure (questions on

which *amici* take no position), *Buckley* and its progeny provide a basis for protecting their identities from disclosure without making unwarranted inroads into the general utility and value of public records laws. If the Court concludes that referendum petitions may, in some circumstances, be constitutionally immune from public-records law disclosure, this case should be remanded to the district court to address the question whether disclosure of their names in the particular context of this case would subject them to unreasonable harassment and intimidation.

IV. It is Important to Avoid Overbroad Exclusions of Identifying Information from Public Records.

A. Identifying Information Is Critical to the Public Benefits that Amici's Publications Provide.

Many of *amici's* businesses in some way depend on access to names and other identifying information found in public records maintained by government bodies on the federal, state and local levels. As a general matter, identifying information, whether linked to a "political" public record or not, is routinely used in a variety of contexts that serve important purposes. For example, such identifying information in *amici's* products and services is an important tool in the hands of law enforcement:

> Subscription to [amici's public records databases] allows FBI investigative personnel

> to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.[2]

In addition, law enforcement efforts benefit from technology developed by *amici* that assists them in

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[2] *Hearing on the 2000 Budget* before the Senate Committee on Appropriations, Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, at 280 (Mar. 24th, 1999) (Prepared Statement of Louis Freeh, Director, FBI). *See also* The Privacy Office, Department of Homeland Security, Privacy and Technology Workshop, Official Transcript at 19 (Sep. 8, 2005) ("[I]f you look back 23 years ago, if I wanted to gather information about a subject, ... We would have to physically go down to the courthouse to get real estate records, we would have to be sending these to another state to go get a driver's license record or a picture, we would have to go to a lot of different places, and manually gather this information . . So, I looked at commercial databases as a way to efficiently gather information .") (comments of Chris Swecker, Assist. Director of the Criminal Investigative Division for the FBI), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_wk2005_transcript_panel1.pdf (last viewed Apr 1, 2010).

identifying and locating sex offenders in near real time.[3]

The ability of various *amici* and others to perform background checks that enable employers and volunteer organizations to make more intelligent employment decisions is dependent on their access to criminal history information that identifies specific individuals. Moreover, commercial entities routinely rely on products produced by *amici* to prevent fraud by helping authenticate the identity of those with whom they are contemplating doing business and alert them to any indicators of potential fraud. For example, when an e-commerce customer types in a delivery address that does not match his or her credit card billing address, *amici*'s anti-fraud products flag that transaction for additional scrutiny by the seller to ensure the transaction is legitimate. Similarly, when that product is delivered, if the carrier cannot find the right address, *amici*'s products can cross-reference the address with other available identifying information to assist the carrier in making the delivery.

The inclusion of political identifying information in public records provides important indirect public benefits. Certain *amici* rely on the

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[3] *See* LexisNexis, White Paper, Using Groundbreaking Technology to Enhance Law Enforcement Efforts to Locate Sex Offenders, *available online*, http://www.lexisnexis.com/government/insights/whitepapers/Sex_Offenders.pdf.

identifying information in so-called "political" records to help intelligence and law enforcement agencies to be more efficient and accurate. For example, some *amici* cross-reference voter registrations with other information to ensure that law enforcement and intelligence agencies are searching for the right "John Smith." There are numerous other examples of the value of the use of identifying information in databases compiled by commercial entities—such as tracking down parents who refuse to pay child support or heirs to an estate, or verifying that a borrower has the proper assets to collateralize a loan.

Moreover, the use of identifying information is heavily involved in research that results in additional First Amendment activity and stimulates public dialog. For example, readers of American Business Media's publications receive information about who in a given industry is petitioning the government, and on what subject. In addition, journalists, watch dog entities, political parties and candidates, campaign researchers and others frequently use politically-related information to determine who sponsored or benefited from, as well as how specific legislators voted on, particular political initiatives.[4] Users of *amici's* and similar

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[4] "Watch-dog" groups that seek to keep the federal and state governments accountable consider political information critical to their mission. For example, OpenSecrets.org allows the public to track political expenditures made by those that lobby the federal government, including by individuals, lobbying firms, or area of interest. *E.g.*, http://www.opensecrets.org/orgs/indivs.php. *See also, e.g.*,

publications often view political contribution, voter registration, and lobbying disclosures (e.g., who lobbied on behalf of whom for a particular piece of legislation) in the context of soliciting additional information to attempt to persuade voters of the validity of their position, but that is by no means the limits of the use of such information. The analysis, publication and discussion of such information serve to enhance political debate and benefit the general public.

B. The Adoption of a Broad Constitutional Rule Poses A Real Threat to the Important and Legitimate Uses of these Public Records.

The federal Freedom of Information Act, the Washington Open Records Act and other similar state public records laws operate in the same general way. They require disclosure of information held by the government if the information falls within the relevant law's definition of a public record and its disclosure is not barred by a specific exception. *See, e.g.*, 5 U.S.C. § 552, Wash. Rev. Code § 42.56.001 *et seq.* The structure set forth in FOIA and replicated throughout the several states has provided the public with a nationwide, generally uniform means of accessing and publishing government information. The presumption in favor of the release of

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http //www.FollowtheMoney.org (state analog of opensecrets org permitting members of the public to search through campaign and lobbyist disclosure information for all fifty states by lobbyist, lobbying firm, or area of interest)

identifying information in public records consistent with this relatively uniform system—broadly construed access to public records and narrowly read exceptions to that access—serves the public interest in many ways.

Amici fear that, in practice, this Court's adoption of the broad proposition supported by the District Court will interfere with the legitimate and important use of public records by creating situations in which access to those records will effectively be denied. In ordinary cases, the government bears the burden to show that a particular record is governed by an exception. *See, e.g.*, 5 U.S.C. § 552(a)(4)(B); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526, 529 (Wash. 1990). If the record is public and no exemption applies, it must be disclosed no matter what the purpose of the requester. *See, e.g.*, Wash. Rev. Code § 42.56.080 (requiring public records to be disclosed no matter what the identity of the requestor); Government-in-the-Sunshine Manual, A Reference for Compliance with Florida's Public Records Laws 101-103 (2003) (citing, *inter alia*, Fla. Stat. § 119.07(1)(a)); *Santa Clara v. Superior Court*, 89 Cal. Rptr. 3d 374, 391-92 (6th App. Dist. 2009) (describing lack of custodian discretion and public policy of disclosure). That structure, a cornerstone of the movement in the latter part of the 20th century that lead to the adoption of PRAs nationwide, removed the unbridled discretion that public record custodians had

previously enjoyed with respect to the disclosure or non-disclosure of public records.[5]

In this case, petitioners seek to have the First Amendment create its own exemption to every state and federal law for issue petitions. Brief of Petitioner, at 28, 29, *Doe v. Reed*, No. 09-559 (2010). That overbroad position readily threatens not only the availability of issue petitions, but voter registration information that *amici* use to confirm identities. Certainly, the "privacy" of other information, such as political contributions and lobbying disclosures used both by *amici* and their customers for expressive purposes, will readily become the target of further litigation if petitioners' suggestion were adopted.

Outside of the "political" context, *amici* fear that record custodians, those identified in public records who desire to remain anonymous, and others will disrupt this straightforward, orderly process by seizing on the breadth of the rule that petitioners proffer. *Amici's* experience suggests that custodians of public records will be more reluctant to grant

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[5] *See A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.R. REP. NO. 99-253, pt. II, at 2-4 (2005) (discussing the shift from an undefined process for requesting public records to the current presumption of disclosure that is free from "arbitrary or unreviewable actions") Along with the federal government, all fifty states have laws requiring access to public records. The Reporters Committee for Freedom of the Press, Open Government Guide (2006), *available at* http://www.rcfp.org/ogg/item.php?pg=intro.

public record requests—a proclivity that *amici* have experienced in the past as some custodians invoked overly broad and unwarranted "privacy" objections to prevent the distribution of public records under both statutory and constitutional guises. *See, e.g., Matter of Data Tree, LLC v. Romaine*, 880 N.E.2d 10, 15 (N.Y. 2007) (reversing lower court that placed burden of proving applicability of exemption on the requestor in case involving production of real estate records); *Burnett v. County of Bergen*, 954 A.2d 483, 497 (N.J. Super. App. Div. 2008) (finding that disclosure of information lawfully placed on public records violated state constitutional privacy right), *aff'd on other grounds*, 968 A.2d 1151 (N.J. 2009) (affirming judgment of lower court on statutory, not constitutional grounds). This cloud of litigation would both raise the cost of accessing these records and delay *amici*'s acquisition of such records. The harm from these gaps will be felt not only in the political arena, but in the law enforcement and everyday commercial contexts. Indeed, unwarranted delays or omissions of identifying information will create gaps in potentially entire classes of information—weakening not only First Amendment activity such as investigative journalism, scholarly research and political campaigning, but law enforcement and other governmental activity. The Ninth Circuit's decision wisely avoided any such result.

V. Conclusion

The judgment of the Court of Appeals should be affirmed and the case should be remanded to the district court for consideration of count II of the complaint.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2 AND PROTECT MARRIAGE WASHINGTON, *Petitioners,*

v.

SAM REED, et al., *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of record for the ACLJ has presented oral argument before this Court in numerous cases, including *McConnell v. FEC*, 540 U.S. 93 (2003).

The proper resolution of this case is a matter of utmost concern to the ACLJ because of its dedication to First Amendment liberties, particularly in the context of grassroots political activity. The Ninth Circuit's disregard of this Court's controlling precedents on the First Amendment's protection of anonymous political speech must be corrected.

SUMMARY OF THE ARGUMENT

In enabling same-sex marriage advocacy groups to publish to the world the names and addresses of the signers of the Referendum 71 petition, Washington's Public Records Act (PRA) trenches upon Petitioners' First Amendment rights to: 1)

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

anonymous political speech, 2) be free of state-created threats of reprisal for their political views, and 3) associate together to achieve political change.

Circulating and signing ballot initiative petitions is an exercise of popular sovereignty entitled to the highest degree of First Amendment protection. Although the states can regulate the ballot initiative process to ensure its integrity, they must avoid infringing the core political speech rights inherent in ballot initiatives. This Court's precedents establish that when core political speech rights are violated in the context of ballot initiatives, the government faces a "well-nigh insurmountable burden" to justify the violations. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Thus, the Ninth Circuit erred in applying intermediate scrutiny and sustaining the PRA's disclosure requirements.

There is no meaningful First Amendment distinction between circulating ballot initiative petitions, signing them, and voting for them once they qualify for the ballot. All three activities are indispensable to the power of the people to initiate legislation. Stripping the right to anonymity from any of the three activities threatens an essential function of popular sovereignty. The state's interest in protecting the integrity of ballot initiatives does not come close to justifying so severe a violation of First Amendment rights. The Ninth Circuit should be reversed.

ARGUMENT

This case involves a composite of First Amendment liberties, including the right to engage anonymously in grassroots political activity, the right to be free from state-created threats of reprisal for one's political beliefs, and the right to associate with others for the purpose of effecting political change. The disclosure requirements of the Washington Public Records Act (PRA)[1] trample on all three.

Washington's scheme permitting legislation to be subject to popular referendum is but one manifestation of the constitutional principle that the people are sovereign and "have the final say." *Citizens United v. FEC*, 175 L. Ed. 2d 753, 785

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[1] Under Washington's Public Records Act, any Washington citizen can inspect and copy any public record. WASH. REV. CODE § 42.56.070 (LexisNexis 2010). The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency." WASH. REV. CODE § 42.56.010(2) (LexisNexis 2010). As set forth fully in Petitioners' brief, several groups requested access to the Referendum 71 Petition, including the names and addresses of the signers. These groups stated that they would publish on the Internet the names and addresses of the signers. *Doe v. Reed*, 2009 U.S. Dist. LEXIS 91745, *11–12 (W.D. Wash. 2009).

(2010). Popular sovereignty is severely jeopardized when private citizens cannot weigh in on the issues of the day without fear of punishment from other citizens who disagree with them. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) ("The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment") (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978). First Amendment protection of citizen participation in ballot initiatives and referenda is therefore "at its zenith." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186–87 (1999); *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Thus, the burden that states face to justify restrictions on the power of the people to initiate legislation is "well-nigh insurmountable." *Meyer*, 486 U.S. at 425.

I. THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY STRICT SCRUTINY TO PETITIONERS' FIRST AMENDMENT CLAIMS.

Ignoring this Court's controlling decisions in *Meyer* and *Buckley*,[2] the Ninth Circuit held that the burden imposed by Washington's Public Records Act on Petitioners' First Amendment rights triggered intermediate scrutiny only. *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009). The Ninth Circuit erred. The PRA severely burdens the First Amendment right to speak anonymously in support of political change.

A. Circulating And Signing Referenda Petitions Is Core Political Speech.

This Court has established that circulation of ballot initiative and referenda petitions is core political speech. *See Buckley*, 525 U.S. at 186–87; *Meyer*, 486 U.S. at 421–22. Ballot initiatives represent citizen efforts to "achieve political change" and involve communication between the petition circulator and those who indicate agreement with the circulator by signing the petition. The process is

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[2] The Ninth Circuit only mentioned both decisions in passing and dismissively concluded that they did not apply. *Doe v. Reed*, 586 F.3d 671, 677–78 (9th Cir. 2009).

"interactive," *Meyer*, 486 U.S. at 422, and cannot be accomplished without political expression by both circulator and signer. Thus in *Meyer*, this Court applied strict scrutiny to a state law banning the use of paid petition circulators, holding that the law trenched upon the right "to discuss political policy generally or advocacy of the passage or defeat of legislation." *Id.* at 428.

B. Both Petition Circulators and Signers Have a First Amendment Right to Anonymous Political Advocacy.

After *Meyer*, but before *Buckley*, this Court struck down an Ohio law prohibiting the distribution of anonymous campaign literature. Identifying a "respected tradition of anonymity in the advocacy of political causes," this Court held that disclosing the author's identity is no different from other components of the campaign literature that the "author is free to include or exclude." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. *See generally* J. Mill, On Liberty and Considerations on Representative Govern-

> ment 1, 3–4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357; *See also Talley v. California*, 362 U.S. 60 (1960) (city ordinance banning anonymous leafleting violates the First Amendment).

This Court rejected Ohio's argument that the ban on anonymous campaign literature was merely a regulation of the electoral process, subject to an ordinary balancing test in which "the relative interests of the state are considered against the interests of the injured voters." *Id.* at 345–46. Rather, because Ohio's ban was a regulation of "pure speech," strict scrutiny was warranted. *Id.* at 346 (citing *Meyer*, 486 U.S. at 420).

Building upon *Meyer* and *McIntyre*, *Buckley* struck down a Colorado statute requiring 1) petition circulators to wear identification badges, and 2) petition sponsors to disclose the names and addresses of all paid circulators in a report to the state. 525 U.S. at 187. Although the *Buckley* Court did not state that the Colorado law triggered strict scrutiny, it held first, that under *Meyer*, petition circulation is core political speech which is entitled to maximum First Amendment protection, *Id.* at 186–87; and second that the Colorado law was an even "more severe" infringement of the First Amendment than the Ohio law in *McIntyre*. *Id.* at 199. This was because the interaction between petition circulator and signer is more extensive, involving dialog over, and cooperation in, "the desire for political change." *Id.*

The ambiguity raised in *Buckley* about the applicable level of scrutiny to be applied to laws burdening core political speech was resolved this term in *Citizens United*, where this Court stated, "[F]or these reasons, political speech must prevail against laws that would suppress it, whether by design or by inadvertence. Laws that burden political speech 'are subject to strict scrutiny.'" 175 L. Ed. 2d at 782.

Read together, *Citizens United*, *Meyer*, *Buckley*, *and McIntyre* compel the conclusion that the PRA's disclosure requirements must be subjected to strict

scrutiny and that the PRA severely burdens Petitioners' First Amendment right to anonymous political speech. There can be no principled basis upon which to provide First Amendment protection to anonymity for petition circulators but not to those on the other side of the dialog—petition signers. Both circulator and signer are indispensible to the political change that is sought.

C. The Right to Anonymity in Ballot Initiatives Is Just As Important to Meaningful Participation in the Political Process As the Right to a Secret Ballot.

There is no meaningful distinction between signing a referendum petition and voting. Whether the citizen touches a screen, presses a lever, or signs his name, he is participating in the political process—expressing his convictions on the political issue at hand. The right to secret ballot—"the hard-won right to vote one's conscience without fear of retaliation," *McIntyre*, 514 U.S. at 343,—is, of course, one of the most precious rights. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality) (citing *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) (the "right to vote freely for the candidate of one's choice is of the essence of a democratic society")).

The right to secret ballot safeguards citizens from the historic evil of voter intimidation. *Burson*, 504 U.S. at 206. Similarly, the right to anonymity in signing referendum petitions is no less essential in safeguarding signers from reprisal or intimidation. The Ninth Circuit's contention that petition signers have no expectation of anonymity because they see the names of other signers, and because state officials view the signatures in the process of qualifying the referendum petition, is specious. *See Doe*, 586 F.3d 671, 677. The right to secret ballot is not diminished if the voter advertises his political beliefs on a bumper sticker or yard sign. The right to anonymous political speech is not conditional on the citizen's keeping his views entirely to himself. Sharing political opinions with a few others does not justify state-ordered disclosure to the rest of the world.

Nothing in *McIntyre, Buckley, or Burson* suggests that the right to anonymous political expression in the context of a ballot initiative depends upon a showing that there is a "reasonable probability" that participants in a referendum petition drive would face threats, harassment or reprisals. *Cf. Citizens United*, 175 L. Ed. 2d at 801 (disclosure requirements of Bipartisan Campaign Reform Act may be unconstitutional if there is "reasonable probability" of reprisal or harassment). In *Buckley*, this Court struck down the statutory requirement

that the names of the paid petition circulators be disclosed in a report to the state, yet there was no suggestion that petition circulators were subject to the risk of retaliation or harassment. 525 U.S. at 204–05. The Court determined that the exposure of their identities alone had a chilling effect on their First Amendment rights. *Id.* at 199–200.

Similarly, no state conditions the right to secret ballot on a showing that the voter is in danger of retaliation or harassment. In all 50 states, the right to secret ballot is absolute. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality).

Nevertheless, if this Court determines Petitioners' First Amendment right to anonymous political speech is subject to a showing that they are at risk of harassment and reprisal, the Petitioners satisfy that test.

D. Opponents Of Marriage-Like Rights For Same-Sex Couples Are Increasingly at Risk Of Harassment And Retaliation.

Whether states recognize as marriage the relationships of same-sex couples is one of the most divisive issues of the day. It engenders strong emotions from many on both sides of the debate. A small segment of advocacy groups supporting same-

sex marriage have grown increasingly aggressive in targeting for harassment traditional marriage proponents. As Justice Thomas recognized in *Citizens United*, the experience of many Californians who supported *Proposition 8*[3] is the most alarming example of the length to which extremists will go to chill the First Amendment rights of their opponents. *See* 175 L. Ed. 2d at 872–73 (Thomas, J., concurring) (describing the personal threats—including death and bodily injury threats—and property damage that Proposition 8 supporters suffered as a result of the public disclosure of their identities).

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[3] Proposition 8 was a state ballot initiative which amended California's Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Cal. Const. Art I, §7.5. California law required the public disclosure and Internet posting of the names and addresses of donors who gave more than $100 to any committee that supported or opposed Proposition 8. CAL. GOVT. CODE ANN. §§ 84211(f), §§ 84600–84601; §§ 84602–84602.1 (Deering 2010); §§ 84602.5–84604 (West 2005); § 84605 (Deering 2010); §§ 84606–84609 (West 2005).

California's experience is not unique.[4] A year and a half ago in Arizona, Proposition 102 ("Prop. 102") was passed, amending the state's Constitution to provide that "[o]nly a union of one man and one woman shall be valid or recognized as marriage in the state."[5] In response, same-sex marriage supporters advocated an "Equality Boycott" against those who supported Prop. 102.[6] Posting on the Internet lists of Arizona's Prop. 102 supporters, boycott proponents urged the boycott of any businesses that supported or had employees who supported Prop. 102.[7]

In this case, the District Court found the proponents of Referendum 71 have already been subjected to threats and harassment. *Doe v. Reed*, 2009 U.S. Dist. LEXIS 91745, *11–12 (W.D. Wash. 2009).[8] Specifically, leaders of the Protect Marriage

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[4] The problem is not limited to the same-sex marriage controversy. *See Citizens United*, 175 L. Ed. 2d at 872–73 (Thomas, J., concurring) (describing the "cottage industry that uses forcibly disclosed donor information to preempt citizens' exercise of their First Amendment rights.")

[5] Ariz. Const. art. 30, § 1.

[6] Equalityboycott.com, *Fight Back with Your Dollars*, Dec. 8, 2008, http //equalityboycott.com/ (last visited Feb. 3, 2010).

[7] *Id.*

[8] *If You Sign a Petition, it Should Be Public Record*, OLYMPIAN, Dec. 18, 2009, *available at* http://www.theolympian.com/

Washington have received death threats and other threatening emails and blog postings.[9]

WhoSigned.org and its national partner KnowThyNeighbor.org[10] want access to the identities of Referendum 71 petition signers for the purpose of encouraging "uncomfortable" conversations between friends, relatives, and neighbors. [11] An article published in the Olympian on December 18, 2009 stated that, according to a spokesman for the organization WhoSigned.org, opponents of Referendum 71 hoped that by posting the list of names, it "would lead to conversations between neighbors about the legislation" and that "the list would give gay rights advocates the opportunity to educate individuals about the need for equal

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opinion/story/1075142.html.

Id.

[9] Posting of Lurleen to Pam's House Blend, http://www.pamshouseblend.com/main/7 (Jan 18, 2010, 11.00 EST).

[10] Elizabeth Hovde, Editorial, *Privacy and Petitions Group's Warning: If You Sign, Your Name Goes Online*, Sunday Oregonian, June 14, 2009, *available at* http://www.oregonlive.com/hovde/index.ssf/2009/06/privacy_and_petitions_if_you_s.html.

[11] Adam Liptak, *Court to Rule on Right to Privacy for Referendum Petition Signers*, N.Y. TIMES, Jan. 16, 2010, at A13.

protections under the law."[12] When asked about the possible chilling effects of publishing the names, the co-director of KnowThyNeighbor.org, Tom Lang, reportedly remarked "so be it." His position is that people need to be held accountable for the role they play in the lawmaking process.[13]

Under this reasoning, Mr. Lang would also be entitled to the names and addresses of all Washington voters who vote in favor of Referendum 71. The November vote is no less crucial to the legislative success of Referendum 71, than is the petition circulating and signing.

Mr. Lang's apathy notwithstanding, the PRA's forced disclosure of the names and addresses the Referendum 71 petition signers cannot withstand First Amendment scrutiny.

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[12] *If You Sign a Petition, it Should Be Public Record*, OLYMPIAN, Dec. 18, 2009, *available at* http://www.theolympian.com/opinion/story/1075142.html.

[13] Hovde, *supra* note 10.

II. PUBLIC DISCLOSURE OF THE IDENTITIES OF REFERENDUM PETITION SIGNERS VIOLATES THEIR FIRST AMENDMENT RIGHT TO POLITICAL ASSOCIATION.

This Court has long recognized that compelled disclosure of political associations and activities can infringe the First Amendment right to political association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists); *Brown v. Socialist Workers 74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99 (1982). The right to political association is especially important to the advocacy of controversial political viewpoints. *NAACP*, 357 U.S. at 462. The lack of First Amendment protection may deter participation to the point where the movement cannot survive. "The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena." *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (footnotes omitted). Thus, disclosure requirements that infringe First Amendment associational rights are subject to strict scrutiny. *Id.* at 64.

The state interests that justify the campaign finance disclosure requirements at issue in *Buckley*

v. Valeo are irrelevant here.[14] Ballot initiatives do not raise the same risk of fraud and corruption that candidate elections do because there is typically no "quid pro quo" exchanges that can be present in candidate elections. *Buckley v. American Constitutional Law Foundation*, 525 U.S. at 203; *Meyer*, 486 U.S. at 427–28 (the risk of fraud or corruption or the appearance thereof is more remote at the petition stage of an initiative than at the time of balloting).

Washington's asserted interest in the integrity of the Referendum process is protected by other statutory provisions which impose criminal penalties on a petition signer who signs the "petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition . . . ." WASH. REV. CODE § 29A.72.140 (LexisNexis 2010). Additionally, the Washington statute requires the Secretary of State to "verify and canvass the names of the legal voters on the petition," WASH. REV. CODE § 29A.72.230 (LexisNexis 2010), in the presence of "persons representing the advocates and opponents

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[14] Preventing the misuse of campaign funds, enhancing the electorate's ability to evaluate candidates, and enforcing contribution limitations were state interests that prevailed in *Buckley v. Valeo*, 424 U.S. at 66–68.

of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process." *Id.* Significantly, the Washington Supreme Court has held that these provisions "evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people . . . ." *State v. Superior Court of Thurston County,* 81 Wn. 623, 647, 143 P. 461 (1914).

In *Buckley v. American Constitutional Law Foundation,* similar statutory provisions were held sufficient to protect the state's interest in the integrity of the ballot initiative process. 525 U.S. at 205 (citing Colorado statutory provisions making it criminal to forge initiative petition signatures, and declaring petition void if circulator has violated any provision of the laws governing circulation). Publically disclosing the identities of Referendum petition signers contributes nothing to the state's interest in ensuring the integrity of the Referendum petition process. If anything, such disclosure will make future Referenda less likely, as Washington citizens decide that the cost of participation in an exercise of popular sovereignty is too high.

CONCLUSION

Amicus respectfully requests this Court to reverse the Court of Appeals for the Ninth Circuit.

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AMICUS CURIAE BRIEF

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IN THE

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JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,
Petitioners,

v.

SAM REED *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right to freedom of expression and political participation by those who believe in traditional moral values and traditional marriage.

STATEMENT OF THE CASE

In accordance with state of law, citizens of Washington state circulated petitions calling for a referendum election on the state's domestic partnership law passed by the legislature, which extended state marriage law to cover same-sex partners. Petitions containing more than 138,500 signatures were duly filed with the Secretary of State, who canvassed and verified the petitions, and consequently placed the

referendum on the ballot for November, 2009. CP-App. 20a)

Gay rights advocate groups KnowThyNeighbor.org and WhoSigned.org stated publicly that they would request release of the referendum petitions under the state's Public Records Act ("PRA"), and post the names, addresses, phone numbers, and other personal information of the referendum petition signers on the Internet to encourage others to have "uncomfortable conversations" with them. (CP-App. 31a).

The Referendum statute, adopted by public vote of the people, reflects a policy of protecting this personal information. That statute does not make the petitions public or open to general public inspection. RCW Section 29A.72.010 *et seq*. It allows proponents and opponents of a referendum to have observers present while the Secretary of State verifies the signatures, but those observers may not record the names, addresses, or other information on the petitions. RCW Section 29A.72.230 *et seq*. If the Secretary determines that the petition signatures are insufficient for a referendum election, and that is confirmed on any appeal, the statute provides that the petitions are to be destroyed, not released.

Moreover, state Attorney General Opinions issued in 1938 and in 1956 ruled that referendum petitions are not public records subject to disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956). The PRA says nothing about referendum petitions, and after it was enacted then-Secretary of State Kramer held that such petitions were not subject to release under its requirements. A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (CP-App. 67a.); A. Ludlow Kramer, Letter to State Senator Hubert F.

Donohue, July 13, 1973 (CP-App. 66a). Kramer's position was later confirmed in state court. *Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

Nevertheless, Secretary of State Reed stated in 2009 that he would publicly release the referendum petitions on the gay marriage legislation. This was in the context of abusive conduct by gay rights advocates in regard to Proposition 8 on the gay marriage issue in California, including some of the same groups making threats in Washington state over its gay marriage referendum petitions. These advocates posted the names, employers, and contact information of Proposition 8 campaign contributors on the Internet as part of a crusade of harassment and intimidation. (www.eightmaps.com; www.californiansagainsthate.com).

This resulted in death threats against supporters of Proposition 8, threats of violence against their families, and phone and email messages laced with profanity. Homes were vandalized, churches were defiled and disrupted, and cars were spray painted and scratched, with their windows broken and their tires deflated. Supporters were harassed at home and at work, with some losing their jobs because of the disruption.[2] This Court has identified this conduct as cause for concern. *Citizens United v. FEC*, No. 08-205, slip op. at 54 (Jan. 21, 2010) (558 U.S.

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[2] Dkt. 4, Ex. 12 at 10-15, 27-45, 45-51, 52-57; Dkt. 4, Ex. 13 at 2-6, 7-9, 10-12, 13-16, 17-20, 31-34, 35-38, 39-42, 43-45, 46-51, 58-60, 70-75, 76-80, 81-118, 119-36, 143-45, 173-82, 212-15, 223-34, 235-38, 239-45; Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (KFSN-TV), Oct. 31, 2008; Karen Grigsby Bates, *Backers of Calif. Gay Marriage Ban Face Backlash*, NPR, March 5, 2009.

___, 2010 WL 183856 (2010); *Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (2010).[3]

To prevent this travesty of intimidation and harassment from repeating in Washington state, Petitioners brought this action for an injunction against public release of the referendum petitions, arguing that the PRA requiring that release under the Secretary of State's interpretation is unconstitutional. The District Court granted the requested preliminary injunction, but the Ninth Circuit reversed. This Court granted certiorari.

SUMMARY OF ARGUMENT

Signing referendum petitions is core political speech at the heart of the First Amendment, and consequently entitled to its highest possible protection. The law is well established and has been long settled that such core political speech is protected by strict scrutiny.

The evidence in this case clearly establishes that public release of the referendum petitions so that personal information of petition signers can be placed on the Internet would burden the core political speech involved in signing the petitions. The threatened campaign of harassment, intimidation and violence against petition signers that experience and the evidence shows will likely ensue is not a constitutionally permissible burden to place on those trying to exercise their legal rights to call for a referendum election, and to express their desire for change

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[3] KnowThyNeighbor.org had similarly posted the names of referendum petition signers on the Internet in Arkansas, Florida, Massachusetts, and Oregon. www.knowthyneighbor.org.

by petitioning their government for redress of grievances.

There must be no place in our democracy for Brown Shirts seeking to force their way through thuggery and violent intimidation. If this activity is not stopped now, it will become a permanent feature of our politics not only in regard to referenda petitions and elections, but ultimately candidate petitions and elections as well.

No state interest in publicly releasing the referendum petitions and publicizing the personal information of the petition signers has been advanced that is remotely sufficient to justify the resulting burden on the core political speech involved in this case.

ARGUMENT

I. SIGNING REFERENDUM PETITIONS IS CORE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT.

This Court has already recognized that signing referendum petitions is core political speech. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)("*Buckley II*"); *Meyer v. Grant*, 486 U.S. 414 (1988). The Court in *Buckley II* recognized that signing such petitions "involves both the expression of a desire for political change and discussion of the merits of the proposed change." 525 U.S. at 199.

The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *First Na-*

tional Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Citizens United*, *supra*.

Moreover, as the above cited cases make abundantly clear, it is far too late in the day to argue that such core political speech is not protected by strict scrutiny, which the Ninth Circuit below inexplicably failed to recognize. As the Court said in *McIntyre*,

> When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.

514 U.S. at 347. In a factually quite similar case discussed further below, *Brown v. Socialist Workers Comm.*, 459 U.S. 87 (1982), the Court explained,

> The right to privacy in one's political association's and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' *NAACP v. Alabama*, *supra*, at 357 U.S. 463 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 354 U.S. 265 (1957) (opinion concurring in result)), and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest." *Gibson v. Florida Legislative Comm.*, *supra*, at 372 U.S. 546.

The public release of the referendum petitions and the threat of violence, harassment and intimidation that entails is transparently not a time, place and manner restriction, or an "incidental effect on expres-

sive conduct," as the Ninth Circuit also inexplicably failed to recognize. Slip Op. at 14-15. Moreover, Petitioners are challenging the public release of the referendum petitions, not the referendum petition procedures established by the referendum statute. Slip Op. at 12.

In addition, the core political speech involved in signing referendum petitions does not somehow lose its constitutional protection because it supposedly also involves legislative action. First of all, referendum petitions do not involve legislative action, but only whether a question will be put on the ballot before the voters. It is the referendum election that may involve legislative action. Moreover, if the signing of referendum petitions did involve legislative action in addition to core political speech, that could only increase constitutional protection even further, not reduce it. Courts would not tolerate death threats, violence, harassment and intimidation of legislators in regard to their votes, or, analogously, a riot on the floor of the legislature.

This case also implicates the constitutional interest in the right to vote. If effective brown shirts can intimidate petition signers out of signing referendum petitions, then they are effectively intimidating voters out of their right to vote. Compelled disclosure of referendum petitions consequently also transgresses this constitutional interest.

II. PUBLICIZING PERSONAL INFORMATION OF REFERENDUM PETITION SIGNERS WOULD BURDEN CORE POLITICAL SPEECH.

The evidence in this case clearly establishes that public release of the referendum petitions so that personal information of petition signers can be placed on the Internet would burden the core political speech involved in signing the petitions. The threatened campaign of harassment, intimidation and violence against petition signers that experience and the evidence shows will likely ensue is not a constitutionally permissible burden to place on those trying to exercise their legal rights to call for a referendum election, and to express their desire for change by petitioning their government for redress of grievances.

Record evidence shows the chilling effect on core political speech the threatened retribution against petition signers will produce. One California victim of such retribution swore that he would not speak out publicly again in the future for "fear for the safety of children." Dkt. 4, Ex. 13 at 119-36. Another testified that he would have to "seriously consider . . . the safety of family in the future when deciding to support a [similar] cause." *Id.* at 194-97. Others expressed fears for the safety of their family, Id. at 39-42, 43-45, 58-60, 223-34, and testified that they would be less likely to speak out publicly and participate politically in the future because of fears of violence and intimidation. *Id.* at 13-16, 43-45, 70-75, 164-66, 194-97, 219-22. *See also*, Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (www.heritage.org/Research/Family/bg2328.cfm); Dick Carpenter II, *Disclosure Costs: Unintended Con-*

sequences of Campaign Finance Reform (2007) <www.ij.org/publications/other/disclosurecosts.html> (Nearly 60% would be discouraged from political contributions if names and addresses were to be released to the public).

This Court faced similar concerns in *NAACP v. Alabama*, 357 U.S. 449, 451 (1958), where "the question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all of its Alabama members and agents." The Court observed,

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this court recognize that the abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action . . . . The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon, rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's association

> . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 461-462.

The Court granted the requested injunction against the compelled disclosure because it found threats of harassment, intimidation and violence quite similar to those found here:

> We think that the production order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that, on past occasions, revelation of the identity of its rank and file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective efforts to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

357 U.S. 462-463.

Similarly, in *Brown v. Socialist Workers Comm.*, 459 U.S. 87, 88 (1982) the Court considered,

> the question whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law . . . can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties. The Ohio statute requires every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the First Amendment prohibits the government from compelling disclosures by a minor political party that can show a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassments, or reprisals.'

In *Brown*, the lists of names and addresses of contributors and recipients were open to public inspection for at least six years. 459 U.S. at 90. Again as in the present case before the Court, in *Brown*,

> Appellees introduced proof of specific incidents of private and governmental hostility toward the SWP and its members in the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring states, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at a SWP office. There was also evidence that, in the 12 month period before trial, 22 SWP members,

> including 4 in Ohio, were fired because of their party membership.

459 U.S. at 99.

As a result, the Court held,

> The First Amendment prohibits a State from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals. Such disclosures would infringe the First Amendment rights of the party and its members and supporters. In light of the substantial evidence of past and present hostility from private persons and Government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP.

459 U.S. at 101-102.[4]

As the Court said in *The Ku-Klux Cases*, 110 U.S. 651, 666 (1884),

> In a republican government . . . the temptation to control these elections by violence and corruption is a constant source of danger . . . .if the very sources of power may be poisoned by corruption or controlled by violence and outrage . . . then, indeed, is the country in danger . . . .

There must be no place in our democracy for Brown Shirts seeking to force their way through thuggery and violent intimidation. "Brownshirt." *A Dictionary*

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[4] This Court added in *Buckley II*, "[T]he First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." 525 U.S. at 192.

of World History. 2000. *Encyclopedia.com*. 1 Mar. 2010 <http://www.encyclopedia.com> ("The Brownshirts, recruited from various rough elements of society, were founded by Adolf Hitler in Munich in 1921 . . . . Their violent intimidation of political opponents and of Jews played a key role in Hitler's rise to power."); Nazi Germany-Dictatorship, History Learning Site, http://www.historylearningsite.co.uk/Nazi_Germany_dictatorship.com> ("To 'keep the peace' and maintain law and order, the SA (the Brown Shirts) roamed the streets beating up those who openly opposed Hitler."). If this activity is not stopped now, it will become a permanent feature of our politics not only in regard to referenda petitions and elections, but ultimately candidate petitions and elections as well.

III. THERE IS NO COMPELLING STATE INTEREST JUSTIFYING THE BURDEN ON CORE POLITICAL SPEECH INVOLVED IN PUBLICIZING PERSONAL INFORMATION OF REFERENDUM PETITION SIGNERS.

No state interest in publicly releasing the referendum petitions and publicizing the personal information of the petition signers has been advanced that is remotely sufficient to justify the resulting burden on the core political speech involved in this case.

There is no anti-corruption interest served by the public release of referendum petition signatures. The information interest involved in public disclosure of campaign contributions, so the public may know who is financing campaigns, is also not present in this case. The interests involved in financing campaigns can be relevant to citizens in deciding how to vote.

But the identity of particular petition signers involves no similar interest.

The Ninth Circuit court below asserted an interest in "preserving the integrity of the election by promising government transparency and accountability." Slip Op. at 17. But this apparently rhetorical interest cannot remotely justify the burden imposed on core political speech in this case. *NAACP v. Alabama, supra*; *Brown v. Socialist Workers Comm., supra*. There is no government accountability interest at stake in the release of the personal information of referendum petition signers. The release of such personal information also does not promote the integrity of any election.

The court below also asserted an information interest in "providing Washington voters with information about who supports placing a referendum on the ballot." Slip Op. at 17. But there is no government interest in inciting a riot, let alone a compelling one. Publicizing the personal information of referendum petition signers runs contrary to a real constitutional interest in secret ballots. *Burson v. Freeman*, 504 U.S. 191, 206 (1992)("[A]ll 50 states, together with numerous other Western democracies . . . [require] a secret ballot" to prevent "intimidation" and "fraud."); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 343 (1995) (Courts have "embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000). The United Nations also recognizes the secret ballot as a human right. United Nations Declaration of Human Rights, Art. 2.

There is also no anti-fraud compelling interest in this case. Publicizing the personal information of referendum petition signers does not help to combat fraud. The Secretary of State canvasses and verifies signatures on all petitions, including candidate petitions, and is fully equipped to do so. Public observers are allowed to monitor that canvassing and verification process. Criminal penalties also apply for fraudulent signatures.

The record offers no evidence of a problem with signature fraud that these measures are not fully adequate to combat. There is no evidence either that disclosing the personal information of petition signers has ever led to the discovery of any fraudulent signatures.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed, and the relief requested by Petitioners should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN DOE #1, ET AL.,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE, THE CENTER FOR RESPONSIVE POLITICS, AND THE SUNLIGHT FOUNDATION IN SUPPORT OF NEITHER PARTY

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No. 09-559

In the
Supreme Court of the United States

JOHN DOE #1, ET AL.,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI CURIAE

The Brennan Center for Justice at NYU School of Law ("Brennan Center") is a non-partisan institute that seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect the diverse voices and interests that make for a robust democracy.[1] The Brennan Center's Money in

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[1] This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *Amici* affirm that no counsel from a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief,

Politics Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution.

The Center for Responsive Politics ("CRP" or "The Center") is a non-partisan, non-profit 501(c)(3) research group that tracks the flow of money to federal candidates and political parties, analyzes money's impact on public policy, and makes this information available to the public. The Center was founded in 1983 by two U.S. Senators-Republican Hugh Scott of Pennsylvania and Democrat Frank Church of Idaho. Nearly from its inception, the Center has played a unique role in the world of money and politics, converting the raw data collected by the Federal Election Commission (FEC) from federal candidates, parties and political action committees, and creating from it easy-to-understand profiles of candidates, industries, and the money that flows to Congress. CRP's data is widely used and respected by news organizations, the academic community, and by political professionals from all points on the ideological spectrum. While the Center's core work focuses on political finance research and analysis, CRP also advocates effective disclosure and enforcement of the nation's campaign finance laws. The Center filed a brief as amicus curiae in the Supreme Court's consideration of *McConnell v. FEC.*

The Sunlight Foundation was founded in 2006 with the non-partisan mission of using the revolutionary power of the Internet to make

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and that no person other than *Amici* and its counsel made such a monetary contribution

information about Congress and the federal government more meaningfully accessible to citizens. Through its projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since its founding, the Foundation has assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and EarmarkWatch.org, that make millions of bits of information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

SUMMARY OF ARGUMENT

Petitioners ask this Court to invalidate the Washington State Open Records Act at least to the extent it requires disclosure of the identities of signatories to petitions to place initiatives on the ballot in that State. The Act's stated purpose is to foster open government and to allow the citizens of Washington to ensure that their government operates responsibly: "The people insist on remaining informed so that they may maintain control over the instruments that they have created." WASH. REV. CODE § 42.56.030 (2009); *see also Livingston v. Cedeno*, 186 P.3d 1055, 1058 (Wash. 2008) (en banc) ("The primary purpose of the public records act is to provide broad access to public records to ensure government accountability."). In some tension with this public interest in open and transparent government, Petitioners assert an interest in keeping their political participation private, citing a fear of a spectrum of reprisals ranging from social ostracism to demonstrated hostility, and even harassment. This case undoubtedly raises sensitive and serious questions, requiring the Court to strike a balance among interests of constitutional significance – the public's interest in open government and robust public debate and the individual's interest in maintaining privacy for ballot-related activities. The purpose of this submission by amici is not to urge the Court to reach a particular resolution of the claims before it, but rather to direct the Court's attention to the broader disclosure interests that could be affected by its disposition of this case.

In this regard, it is important to recognize that what this case does not involve is an issue that goes to the heart of our constitutional guarantee of democratic self-governance – the necessity of disclosure when money is spent on political campaigns and candidates. Money in politics is different in kind from other election regulation issues. Where money is spent to influence the outcome of elections, vigilance is required to ensure that influence-peddling does not corrupt our democracy and that voters are empowered to make informed decisions about how such spending may have influenced their candidates and laws. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933), *quoted in Buckley v. Valeo,* 424 U.S. 1, 67 (1976). Accordingly, this Court has consistently recognized that special constitutional and public interests arise in the context of disclosure laws that bring to light the too-often hidden flow of money through our political system. A clear and unbroken line of Supreme Court authority holds that campaign finance disclosure provisions serve anti-corruption and informational interests critical to a vibrant and functioning election system. *Buckley v. Valeo,* 424 U.S. at 1, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) *("Buckley II"), McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). Indeed, this Court's recent *Citizens United* decision specifically reaffirmed the necessary role of campaign finance disclosure laws in our democracy.

Ignoring this ruling, as well as the unique constitutional context of money in politics, Petitioners attempt to elide the distinction between campaign finance disclosure laws and other forms of public disclosure laws that do not directly implicate political spending, such as the application of the Act at issue here. Indeed, Petitioners go further, devoting the first six pages of their brief to extra-record factual submissions regarding a law and an issue that is not before this Court – the effect of California's campaign finance disclosure laws on contributors to that state's Proposition 8 campaign. Petitioners devote additional pages of their brief to other supposed factual consequences of campaign finance disclosure laws, and conflate case law from the campaign finance context with other disclosure laws without any apparent regard for the unique interests that come into play when money enters the realm of politics. (Petitioners' Brief, filed February 25, 2010, 43-48 ("Pet. Br.")) Petitioners thus invite the Court to fashion a radically broad and hitherto undiscovered right to anonymous speech that would overturn decades of this Court's precedent by refusing to differentiate between laws requiring disclosure of other activities and laws that disclose the uniquely problematic workings of money in politics.

Amici urge the Court to reject this improper invitation. As a procedural matter, with regard to the sphere of campaign finance disclosure regulations, neither the factual allegations nor the constitutional issues raised by Petitioners are properly before this Court. With respect to the actual issue presented here, the Court may, and indeed should, address the constitutionality of the

Washington statute, and the possible disclosure of the names of the individuals who signed the ballot initiative petitions in question, without reaching the separate factual and legal questions interests to be weighed in evaluating disclosure requirements aimed at monetary influence on the electoral process. More fundamentally, the curtain of privacy that is appropriate to the voting booth should not be drawn to hide the workings of money in politics from public scrutiny and from political accountability. Petitioners' broadest argument, if accepted, could usher in a new dark age for our politics, where corruption could flourish undetected and voters mark ballots in ignorance.

ARGUMENT

I. The Nation's Constitutional Tradition has Consistently Recognized that Transparency Concerning Money in Politics is Essential for the Proper Working of Democracy.

As James Madison once wrote:

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Berry (Aug. 4, 1822), reprinted in 9 The Writings of James Madison 103 (Gaillard A. Hunt ed., 1910). Since this country's founding, its constitutional tradition has recognized transparency concerning money in politics to be a vital anti-corruption tool and a key feature of participatory democracy.

As Professor Zephyr Teachout has explained in an article exploring the historical roots of the constitutional anti-corruption principle, corruption was a primary concern of the constitutional framers. Indeed, at the start of the Constitutional Convention George Mason proclaimed that "if we do not provide against corruption, our government will soon be at an end." Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev 341, 348 (2009).

Concerns about corruption were not limited to unlawful acts like bribery. The Framers understood political corruption as an expansive concept.

> To the delegates [at the Constitutional Convention] political corruption referred to self-serving use of public power for private ends, including, without limitation, bribery, public decisions to serve private wealth made because of dependent relationships, public decisions to serve executive power made because of dependent relationships, and use by public officials of their positions of power to become wealthy.

Id. at 373-74; see also Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 509 (2002) (discussing concern that executive with access to the treasury as well as to offices could "corrupt legislators and free itself from popular oversight"). The delegates' corruption concern was thus not limited to bribery or other unlawful acts. At the Constitutional Convention, for example, Gouverneur Morris "explicitly said that the corruption concern encompassed lawful abuses of power, not merely unlawful abuses or 'usurpation.'" Teachout at 376 (citing Notes of James Madison (July 19, 1787), in 2); The Records of the Federal Convention of 1787, at 52 (Max Farrand ed., rev. ed. 1966) (1937); *see also* Teachout 363-64 (2009). Disclosure is required to bring such corrupting abuses to light.

As the nation developed, and the framers' concerns regarding the corrupting potential of money in politics proved well-founded, the use of a secret ballot – now considered a hallmark of the country's electoral system – developed in response to concerns about combating the influence-peddling that can arise when money enters the political sphere. At the time of the adoption of the Constitution, the country was a smaller, agrarian nation. Most of the population lived in small towns where there was no expectation of privacy around the exercise of political power and voting was typically done in public. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also* Eldon Cobb Evans, *A History of the Australian Ballot System in the United States* 1-10 (1917). During the late 1800s, however, as the population increased and migrated to urban areas, political corruption began to rapidly increase. Non-secret voting was perceived as the root of the problem. By allowing party bosses to check on how individuals voted and refuse to pay if an individual's vote did not match his promise, a non-secret ballot enabled vote buying. See *Burson*, 504 U.S. at 200; Evans, at 10-14, 21. Until the late 1800's, votes were regularly traded for money. As one contemporary writer described:

> This sounds like exaggeration, but it is truth . . . that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a

> recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election.

Burson, 504 U.S. at 201 n.6 (*quoting* J. Gordon, *The Protection of Suffrage* 13 (1891)). As a direct response to this practice, states increasingly adopted a secret ballot. By 1910, the last state adopted the private ballot for most elections. John C. Fortier & Norman J. Ornstein, *The Absent Ballot and the Secret Ballot: Challenges for Election Reform,* 36 U. Mich. J.L. Reform 483, 490 (2003).

The universal adoption of the secret ballot as a tool to combat corruption and enhance public faith in government coincided with the first federal law mandating disclosure of election-related spending. In 1910, Congress enacted the Federal Corrupt Practices Act, the first federal law to establish public disclosure of federal campaign spending. *Buckley v. Valeo,* 424 U.S. at 61. While upholding these provisions in 1925, the Court for the first time expressly sanctioned the use of disclosure as a tool to combat corruption:

> Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in section 244,

> that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

Burroughs v. United States, 290 U.S. 534, 548 (1934). As illustrated below, since *Burroughs*, the Court has repeatedly upheld disclosure requirements.

II. Contrary to Petitioners' Contentions, This Court Has Not Recognized A Right To Spend Money Anonymously in Political Campaigns

The Court has never recognized a general right to spend money anonymously in elections. To the contrary, from *Buckley v. Valeo,* 424 U.S. 1, to *Citizens United v. Fed. Election Comm'n*, No. 08-205, Slip. Op. (Jan 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)),[2] this Court has repeatedly upheld disclosure and disclaimer provisions relating to campaign contributions and independent expenditures in both ballot measure and candidate elections. *Buckley v. Valeo,* 424 U.S. 1; *Buckley II*, 525 U.S. 182 (ballot measures); *Bellotti*, 435 U.S. 765 (ballot measures); *McConnell*, 540 U.S. 93; *Citizens United.* Petitioners nonetheless rely heavily on *Buckley v. Valeo*, 424 U.S. 1 and

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[2] Citations to *Citizens United v Fed. Election Comm'n*, No. 08-205, Slip. Op. (Jan 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)) are to the Slip Opinion herein.

McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995), to support their claim of a general right to anonymity in the political process that is broad enough to defeat disclosure of political spending. Pet. Br. at 24-25. Neither case supports this broad proposition.

In *Buckley v. Valeo*, 424 U.S. 1, contrary to Petitioner's claims, the Court did not articulate a "general privacy interest" in political spending. Pet. Br. at 24-26. To the contrary, the Court recognized the seriousness of the interests served by the disclosures set out in federal law and upheld them against claims of infringement of constitutional rights. In doing so, the Court also acknowledged the "possibility" that disclosure "c[ould] seriously infringe on privacy of association and belief". 424 U.S. at 64. In those circumstances, "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied," *id.* at 71, the Court crafted an exemption to disclosure.

But this narrow, as applied exemption was conceived of as having very limited applicability. The specific challenge before the Court in *Buckley v. Valeo* was the application of general disclosure requirements on contributions to and expenditures related to minority parties. The Court rejected this claim because of the lack of "record evidence" to support allegations of harassment or intimidation. *Id.* at 31. And the discussion relied upon by Petitioners was in the context of minority parties where, the Court observed, governmental interests supporting disclosure may be lessened and potential damage to associational rights might be heightened.

Id. at 70. What the Court expressly declined to do was to create any sort of untethered privacy right that could defeat the compelling interests in disclosure it had just articulated. And in fact, the Court declined the invitation to create any sort of blanket exemptions from disclosures of expenditures and contributions for minority parties or anyone else. *Id.* at 74.

The Court's decision in *McIntyre* provides no more of a underpinning for Petitioners' overly broad claims of a right of anonymous political activity. Like *Buckley v. Valeo*, it simply allows for an extremely narrow and fact-specific exemption to disclosure. At issue in *McIntyre* was an as-applied challenge to a state law that required a disclaimer on all campaign literature, regardless of the volume of such literature. *Id.* at 336, 339. Plaintiff was a lone pamphleteer who had distributed personally crafted leaflets at a public meeting to oppose a referendum on a school tax levy. *Id.* at 337. In holding that the provision was unconstitutional as applied to her, the Court took great care to delineate the boundaries of its decision, and distinguished direct regulation of leaflets from regulation of financial disclosures. *Id.* at 355 ("[I]dentification of the author against her will . . . reveals unmistakably the contents of her thoughts on a controversial issue. Disclosure of an expenditure and its use . . . reveals far less information.") The Court also clarified that its decision did not address the more expensive medium of broadcast communications but addressed "only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed." *Id.* at 338 n.3. In addition, the Court expressly reaffirmed the

constitutionality of disclosure requirements of contributions and expenditures in candidate elections previously upheld in *Buckley v. Valeo*, noting that those requirements contained a threshold that excluded *de minimis* spending. *Id.* at 355-56. The Court also reaffirmed its prior stated approval of disclosure of corporate spending in ballot measure elections articulated in *Bellotti*. *Id.* at 353-54.

Thus, contrary to Petitioner's characterization of the case as establishing a broad right to anonymous speech, *McIntyre* instead represents a narrow opinion that expressly does not consider these broader financial disclosure issues. *Id.*[3] Indeed, as Justice Ginsburg wrote in concurrence, "appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process 'might justify a more limited identification requirement." *Id.* at 358.

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[3] The Ninth Circuit has adopted this approach to disclosure. In *Canyon Ferry Road Baptist Church of East Hampton, Inc. v. Unsworth*, 556 F.3d 1021, 1034-35 (9th Cir. 2009), the Ninth Circuit held that a Montana disclosure provision that required reporting of *de minimis* levels of in-kind expenditures in support of a ballot measure to be reported was unconstitutional as applied to a Church. The Court held that disclosure of *de minimis* amounts of support was not sufficient to achieve the government's goal to inform voters.

III. The Public's Interests in Combating Corruption and Empowering Voters to Make Informed Decisions Apply With Special Constitutional Significance to Disclosures of Political Spending.

As this Court repeatedly has recognized, the First Amendment interests of political actors are not the only constitutional interests this Court must consider. When political spending is regulated to ensure the integrity of the democratic system, "constitutionally protected interests lie on both sides of the legal equation... [because such regulations] seek to protect the integrity of the electoral process· the means through which a free society democratically translates political speech into concrete governmental action." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 400-01 (2000) (Breyer, J. concurring). The public has a constitutional stake in the question of who is paying for its laws. *Buckley II*, 525 U.S. at 214 (Thomas, J. concurring) ("I am willing to assume...that Colorado's interest in having this information made available to the press and its voters [] before the initiative is voted upon...is compelling. The reporting provision ... ensures that the public receives information demonstrating the financial support behind an initiative proposal before voting.").

By conflating case law concerning disclosure in the campaign finance context and disclosure in other contexts, the Petitioners fail to recognize the unique public interests that justify the incidental burden that disclosure of election-related spending may impose on the political activities of people and

corporations. Indeed, the Court in the seminal case of *Buckley v. Valeo* recognized that disclosure of campaign spending is "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68 (footnote omitted).

Since *Buckley v. Valeo*, the Court has consistently recognized that disclosure of political spending: (1) "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" (2) "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office;" and (3) "[is] an essential means of gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 66-68; *accord McConnell*, 540 U.S. at 196 (affirming compelling governmental interests in "providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"). On these bases, this Court, along with lower federal courts and state courts, has consistently upheld robust campaign finance disclosure regimes. *Buckley v. Valeo*, 424 U.S. at 61-62; *Nixon*, 528 U.S. 377; *Buckley II*, 525 U.S. 182; *McConnell*, 540 U.S. 93; *Citizens United*.

This Court's decision in *Buckley II* aptly demonstrates key distinctions between the differing governmental interests present in disclosure related to monetary political activity and disclosure related to identity of political speakers with no financial

component. In *Buckley II*, the Court was called upon to decide the constitutionality of Colorado regulations of the ballot initiative process – the process under which laws are enacted by ballot referenda. 525 U.S. at 186. Some of the regulations required name tags and other on-site identification of ballot circulators, the people who approached voters to gain petition signatures, even though the ballot circulators were required to file affidavits with the state disclosing their identification at the time they submitted their petitions. Others required that those ballot circulators be registered Colorado voters and meet other criteria. The Court had little trouble striking down most of those regulations as an unjustified burden on the First Amendment protected speech right to circulate ballot petitions. *Id.* at 197, 200.

The Court declined, however, to upset the state requirements mandating disclosure of the names of proponents of ballot initiatives and the amount spent to collect signatures for their petitions. *Id.* at 203-04. That disclosure requirement informed voters "of the source and amount of the money spent by proponents to get a measure on the ballot; in other words, voters will be told who has proposed a measure, and 'who has provided funds for its circulation.'" *Id.* at 203 (internal quotations and citations omitted). As the *Buckley II* Court concluded:

> To inform the public where the money came from, we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose who pay petition circulators, and how much.

Id. at 204. *Buckley II* aptly demonstrates that the Court recognizes that the public's interest in combating corruption and informing the electorate apply with special force to disclosures of campaign finance information. *Id.*

A. Anti-Corruption Interest

In numerous campaign finance disclosure cases over the decades, the Court has, reaffirmed the wisdom of Justice Louis Brandeis oft-cited insight that "Sunlight is said to be the best of disinfectants." L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933), *quoted in Buckley v. Valeo,* 424 U.S. at 67. *Accord Buckley II,* 525 U.S. at 223; *McConnell v. Federal Election Comm'n,* 251 F. Supp. 2d 176, 277 (D.D.C. 2003). This Court has consistently upheld broad disclosure requirements of campaign finance activity even in instances in which the state would be constitutionally barred from imposing direct burdens on the campaign finance activity subject to the disclosure requirements.

The Court in *Buckley v. Valeo* explained that transparency of monetary contributions in elections both directly combats corruptions and empowers the citizenry and press to detect and respond to improper uses of money in politics and in governing. 424 U.S. at 67. The Court stated that such disclosures served to "discourage those who would use money for improper purposes either before or after the election" and that "a public armed with information about a candidate's most generous supporters is better equipped to detect any" special favors after the election is over. *Id.* The Court held

that these interests were "sufficiently important to outweigh the possibility of infringement [of the exercise of First Amendment rights], particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66.

Over the years, facts have amply borne out the Court's prediction, as a press and voting public have used disclosure laws to hold elected officials accountable for apparent undue influence. For example, in 1997, the President of Amway and his wife collectively contributed $1 million to the Republican Party. The press reported widely on this, linking it to an eleventh-hour intervention by the Republican Speaker of the House to push a tax-bill that provided Amway with a tax break worth $280 million. Davis Hess & Robert Rankin, *Clinton Pledges Line-Item Vetoes: Some Special Favors in the Tax-Cut and Budget Bills Would be Rejected*, The Philadelphia Inquirer, Aug. 7, 1997 at A1; David Hess & Charles Pope, *In The Tax Bill There's A Gift Just For Tobacco Industry*, The Philadelphia Inquirer Aug. 1, 1997 at A1. Disclosure also enabled the Senate Ethics Committee to hold Senator Alan Cranston accountable for his improper conduct in the infamous Keating 5 scandal of the 1980's. The Ethics Committee rebuked Senator Cranston after discovering that he intervened with regulators on behalf of a Savings and Loan while soliciting almost $1 million for his campaign and affiliated voter registration groups. Without disclosure, the Ethics Committee may have never discovered this improper dealing. Helen Dewar, *Panel Votes To Rebuke Cranston*, The Washington Post, November 20, 1991 at A1.

More than twenty years after *Buckley v. Valeo,* in *McConnell,* eight Justices of this Court concluded that government interests were sufficiently strong to support disclosure of money used to fund a newly created category of campaign related spending -- electioneering communications. *McConnell* held those interests were "providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell,* 540 U.S. at 196. *McConnell* also upheld disclosure requirements relating to donations of "hard money" to political parties[4] stating, "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA." *Id.* at 156. Although the Court in *Citizens United* struck down many of the restrictions on funding applicable to electioneering communications, it expressly upheld the statute's disclosure requirements pertaining to these electioneering communications. (Slip Op. at 50-52.)

Following this Court's lead, State and lower federal courts have also consistently upheld

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[4] Hard money, generally speaking, is money that is subject to contribution limits and disclosure requirements that may be used directly by campaigns and political parties for any election-related purpose. In contrast, soft money, generally speaking, refers to funds contributed to candidates or political parties that are restricted in their use -- and funds that are not uniformly subject to contribution limits or disclosure requirements. *McConnell,* 540 U.S. at 122-23.

campaign finance disclosure statutory schemes, and recognized that that disclosure serves anti-corruption interests. *Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n*, No. 2:08-cv-00492, 2008 WL 4186312, at *6 (S.D. Ohio Sept. 5, 2008) (upholding Ohio's campaign finance disclosure law because it was supported by the same compelling interests in preventing corruption and the appearance of corruption that were recognized in *McConnell*) *Koerber v. Federal Election Comm'n*, 583 F. Supp. 2d 740, 746 (E.D.N.C. 2008) (upholding disclosure requirements since they bore a "strong" correlation to the interests recognized in *Buckley v. Valeo* and *McConnell*)); *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616, 623 (Alaska 2004) (upholding Alaska's "soft money" disclosure requirements); s*ee Colorado Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1144 (10th Cir. 2007) (upholding against a facial challenge a requirement that nonprofit organizations disclose disbursements for electioneering communications over a $1,000 threshold); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir.), *cert. denied* 549 U.S. 886 (2006) (upholding as constitutional Alaska's registration and financial reporting requirements for all non-PAC groups, even if they are small nonprofit political organizations of the type contemplated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)); *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose "express advocacy"). It cannot be disputed that disclosure is the *sine qua non* of combating corruption.

B. Voter Informational Interest

Another vital interest behind disclosure requirements that the Court has repeatedly recognized over the last thirty years is providing "the electorate with information 'as to where political campaign money comes from and how it is spent,' thereby aiding electors in evaluating those who seek their vote." *Buckley II*, 525 U.S. at 202 (quoting *Buckley v. Valeo*, 424 U.S. at 66). Information about elections, candidates, funding of candidates and issues, is indispensable to the functioning of a democracy in which the voters decide who runs the government. As described by the *Buckley v. Valeo* Court, disclosure of financial contributions and spending "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches," and helps facilitate predictions of future performance in office. 424 U.S. at 66-67; *see also Bellotti*, 435 U.S. at 792 n. 32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("[T]here is no risk that the ... voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known.").

Contrary to Petitioners' arguments to this Court, this fundamental public interest in disclosure is not undermined by non-peer reviewed "studies"

containing polls of "voters" and whether they accessed specific records. Pet. Br. at 44 [5] It is, however, incontrovertible that the institutional press, the internet press, academia and many publicly inclined not for profit organizations have made widespread use of the data generated by the longstanding public disclosure requirements, and that these reports have been disseminated widely both before and after elections. This kind of information has been used for indispensable reporting during elections, revealing the depth and nature of support for particular candidates, parties or causes.

For example, Petitioners chronicle the alleged harassment that occurred as a result of disclosure during California's Prop 8 election in their brief but they completely ignore the vital information that was disseminated to voters as a result of disclosure in that case. In the months leading up to the election, the press, relying on disclosure reports,

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[5] The "study" that is cited by Petitioners is actually a public opinion poll commissioned by the Institute of Justice and filled with stories of citizens who allegedly were damaged in some way by having to comply with election related regulations. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007)(*available at* www.ij org/publications/other.disclosurecosts.html) It is respectfully submitted, however, that before such material whose methodology and integrity cannot be easily verified is relied upon for such sweeping conclusions as that disclosure provisions do not inform voters, it should be properly authenticated, introduced into evidence and its proponents and provenance be subject to cross-examination. Pet. Br. at 45. This is especially true as this conclusion contravenes decades of this Court's precedents, common sense, and the public record.

reported that nearly one-third of the $15 million raised in support of Prop 8 was raised by the Morman Church. Mark Schoofs, *Mormons Boost Antigay Marriage Effort: Group Has Given Millions in Support of California Fund*, Sept. 20, 2008 *available at* online.wsj.com/article/SB122186063716658279.html?mod=googlenews_wsj. Certainly this information was of vital importance to California voters seeking to make an informed decision regarding how to vote on this proposition.

As a further example, during the 2008 presidential campaign, for example, the data available allowed reporters to scrutinize both the Obama and McCain campaigns' funding sources. *See e.g.* Michael Luo, *Family's Donations to McCain Raises Questions*, New York Times, August 7, 2008 (discussing the donations connected to one extended Jordanian family in California to John McCain, Hillary Rodham Clinton and Rudolph Guiliani); Jeanne Cummings, *Big Pharma Veers to the Left*, Politico, September 23, 2008, *available at* www.politico.com/news/stories/0908/13766.html (reporting that to date 'the drug companies have given a total of $17 million, with half ($8.5 million) going to Democrats and half ($8.5 million) going to the old allies"). In particular, the Obama campaign widely publicized its claim that it had raised a significant amount of money from small donors. Information obtained from campaign finance disclosures enabled reporters to analyze that information. See Michael Luo & Griff Palmer, *Fictitious Donors Found in Obama Finance Records*, New York Times, October 10, 2008 (addressing concerns, after false names were discovered on the

candidate Obama's campaign finance records, that the Obama campaign was not vetting its "unprecedented flood of donors" properly) *available at* www.nytimes.com/2008/10/10/us/politics/10donate.html?_r=1&scp=1&sq=fictitious%20donors&st=cse; Kimberly Kindy & Sarah Cohen, *The Donors Who Gave Big and Often*, The Washington Post, January 18, 2009 at A02 ("Nearly 100 wealthy families and power couples contributed at least $100,000 each to help Barack Obama over the past two years.")

This kind of data and the reporting on it also sheds light on the wider picture of political activism in this country. Politico.com reported, for example, that women gave triple the amount of money to presidential candidates in 2008 than they did in 2000. Jeanne Cummings, *Women Donors Triple Contributions*, Politico, September 23, 2008, *available at* www.politico.com/news/stories/0908/13767.html.

Despite Petitioners' "study" claiming that the public does not access campaign finance data, the widespread use and dissemination of this data is undeniable.[6] For example, the website opensecrets.org, run by *Amicus,* The Center for Responsive Politics, counted over 15 million visitors

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[6] Petitioners' arguments here are mutually contradictory. On the one hand they claim that information generated by disclosure is so widespread and pervasive that it leads to an ongoing and urgent danger to privacy. Pet. Br. at 46-47. On the other, they contend, the information is so insignificant that it is buried in government archives and utterly fails to fulfill its intended purpose of informing voters. Pet. Br. at 44. Petitioners are certainly incorrect in their latter contention.

in 2007. Opensecrets.org aggregates and synthesizes large amounts of campaign related information made public through disclosure requirements in a format that is easy to use by both the public and the press. www.opensecrets.org/about/tour.php. According to searches in Westlaw's ALLNEWS database the website's campaign finance data has been used in news and opinion articles in more than 10,000 instances. [7]

As the above examples demonstrate, campaign finance disclosures are essential to enable the press to perform its function as the watchdog of government. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("the basic assumption of our political system [is] that the press will often serve as an important restraint on government. ... and an informed public is the essence of working democracy."). Such a role is not possible if the important facts concerning funding and influence are hidden from both the press and the public.

The public interest in financial information relating to elections is not limited to campaign contributions, but also extends to information about

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[7] A search made on March 2, 2010, in the Westlaw ALLNEWS database for the website's administering organization, the Center for Responsive Politics, generated over 10,000 instances in which the website's campaign finance date has been used in news and opinion reports and articles. Other websites that generate reports and articles from campaign finance disclosure data include the Campaign Finance Institute, www.cfinst.org/, National Institute on Money in State Politics www.followthemoney.org, and politico.com.

the funding of individual expenditures. While there are no limits on the amounts that may be spent independently in connection with an election, independent expenditures, like campaign contributions, trigger disclosure requirements under the federal statutes.[8] These disclosure requirements ensure that voters, opposing candidates, and the public understand the full context of an election for public office--who supports the candidate, who opposes the candidate, the basis published for that position and information helpful to evaluating that publicly acknowledged position. *McConnell,* 540 U.S. at 196-97 (2003); *see Citizens United, supra,* Slip Op. at 51, 52, 55. In *McConnell,* the Court relied upon the extensive factual record that had been developed in the court below and cited examples of how the system had been abused to permit corporations and labor unions to fund advertisements designed to influence elections while concealing their identities from the public. The Court quoted from the District Court's opinion the wry observation that "Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public," and characterized the position before it as ignoring "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197, *quoting*

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[8] The disclosure requirements for independent expenditures require that expenditures above specific thresholds within a certain time period before an election or primary be reported to the Federal Election Commission. *See e.g.*, 2 U.S.C. § 434(f)(1)&(f)(2).

McConnell v. FEC, 251 F. Supp. 2d at 237. The *McConnell* Court further noted that disclosure requirements concerning the funding of electioneering communications were constitutional, both because they do not limit speech and because they inform the electorate:

> As the District Court observed, amended FECA § 304's disclosure requirements are constitutional because they "'d[o] not prevent anyone from speaking.'" Moreover, the required disclosures "'would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters *before* election day.'"

540 U.S. at 201 (internal citations omitted)(emphasis in original).

Lower courts have also found that disclosure serves an informational interest for voters. A Washington federal district court concluded that disclosure of spending on ads about ballot issues was constitutional because of the public's right to cast an informed vote:

> Accordingly, the Court rejects [plaintiffs'] contention that there is a bright-line rule prohibiting the regulation of "issue advocacy" and holds that the state's compelling interests in informing the electorate and protecting contributors justify requiring "political

> committees" to report on and disclose all expenditures made "in support of, or opposition to ... a ballot proposition." This holds even when "expenditure" is defined to include some advocacy as to the "issue" underlying the proposition, as long as such regulations are limited to the specific issue on which the public's vote is being sought.

See also Human Life of Washington, Inc., v. Brumsickle, No. 008-0590-JCC, 2009 WL 62144, at *18 (W.D. Wash. 2009), *appeal docketed* No. 09-35128 (9th Cir. 2009); *see also California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1189 (9th Cir. 2007) (California's campaign finance disclosure law serve an informational interest).

This critical need for public information about the forces affecting elections in this country are stymied when financial interests hide behind false and innocuous sounding names to disguise their true identity and agendas.[9] One recent example of this

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[9] Troublingly, the incidence of undisclosed corporate political spending appears to be increasing. For example, a recent New York Times article about the effects on the funding of elections that followed this Court's decision in *Wisconsin Right to Life v. Federal Election Comm'n*, 546 U.S. 410 (2006), concluded that "After the 2006 Wisconsin Right to Life decision, there was no sudden surge in direct corporate spending on issue advertising. Electioneering communications spending by nonprofit groups that did not identify their donors, however, increased sharply. Of the $98.7 million in electioneering communications reported in the 2004 cycle, virtually all was accompanied by identification of at least some donors. In the 2008 cycle, over one-third of the $116.5 million reported was

occurred when the U.S. Chamber of Commerce gave a substantial donation to a group with a benign sounding name that did not comply with applicable disclosure requirements. *Voters Educ. Comm. v. Washington State Public Disclosure Comm'n*, 166 P.3d 1174 (2007). The Chamber had given $1.5 million dollars to a group called the "Voters Education Committee" which in turn spent the money on political television advertisements criticizing Deborah Senn, a candidate for Attorney General of Washington, without registering as a political committee or disclosing information about its contributions and expenditures. *Id.* at 1177. Concluding that the organization should have been registered as a political action committee under Washington law, the court explained that "these disclosure requirements do not restrict political speech--they merely ensure that the public receives accurate information about who is doing the speaking." *Id.* at 1189.

The record in before the Court in *McConnell* contained many examples of interests that veiled their federal political expenditures with misleading names. There, the Court found that the "The Coalition-Americans Working for Real Change" was a business organization opposed to organized labor and "Citizens for Better Medicare" was funded by the pharmaceutical industry. 540 U.S. at 128, 197. Wealthy individuals have used similar tactics. For

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not accompanied by donor identification." Griff Palmer, *Decision Could Allow Anonymous Political Contributions by Businesses*, The New York Times, Feb. 27, 2010, *available at* www.nytimes.com/2010/02/28/us/28donate.html?pagewanted=1

example, Texas millionaires and brothers Charles and Sam Wyly spent approximately $25 million on advertisements endorsing George W. Bush during the 2000 primaries. They did so, however, in secrecy, using the name of "Republicans for Clean Air" to shield their involvement. *McConnell v. FEC*, 251 F. Supp. 2d at 232.

In short, the real need of the voters to understand what issues, which institutions, and whose money are actually at play in an election creates a critical disclosure interest not necessarily implicated in the disclosure of petition signatures at issue in the present case.

C. *Citizens United* Reaffirmed the Critical Governmental Interests in Requiring Transparency of Money in Politics

Just a few months ago, this Court issued an important ruling that reaffirmed by the disclosure requirements for independent expenditures against a claim of constitutional burdens on association and infringement of privacy interests. In *Citizens United*, the Court expressly based this part of its ruling joined by eight justices upon the key governmental and societal interests in providing the electorate with information. The Court made clear that:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions

> and give proper weight to different speakers and messages.

Slip Op. at 55. While simultaneously ruling that such expenditures are deserving of the broadest First Amendment protection and striking down long standing federal statutes prohibiting corporations and labor unions from engaging in such independent expenditures, this Court emphasized the importance of transparency in the remaining campaign regulatory system. The Court accordingly rejected the challenge to the provisions mandating disclosure of independent expenditures. *Id.* at 52. In doing so, the Court held that disclosure must be substantially related to a "'sufficiently important'" government interest. *Id.* at 51 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)), and the Court found sufficient the government's interest in informing the public on the sources of election-related spending. *Id.* (citing *Buckley v. Valeo*, 424 U.S. at 66).

The Court also explicitly recognized the Internet's key role in facilitating transparency in the context of money and politics. While Petitioners have emphasized what they believe are the negative possibilities in the free availability of information on the Internet (Pet. Br. at 46-49), they completely overlook the Internet's enormous capacity to streamline access to information that previously would have been available only to scholars or government officials and would not have been sufficiently timely to help voters evaluate candidates or election issues. Modern technology makes disclosures immediate and informative, thereby enabling citizens, for example, to learn about candidate's financial support prior to an election.

Citizens United ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."). The Internet also provides rapid access to corporate financial disclosures that allow shareholders to determine whether their corporations' political speech, in the form of independent expenditures, advances their corporations' legitimate interests. Slip Op. *at 55.*

This Court in *Citizens United* concluded that disclosure requirements coupled with the ready availability of information on the Internet rendered some of the concerns that had motivated Congress to ban certain kinds of spending less valid:

> Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." 540 U. S., at 259 (opinion of SCALIA, J.); see MCFL, supra, at 261. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. *Id.*

In our First Amendment tradition, secrecy is the exception, transparency is the constitutional rule.

IV. In the Campaign Finance Context, This Court Has Required a High Burden of Proof to Warrant an Exemption from Disclosure.

Although the issue is not properly before the Court,[10] the Petitioners broadly claim that a blanket exemption from disclosure is warranted for all "intimidated groups" based on "proof of intimidation against supporters of traditional marriage" in California. *See* Pet. Br. at 33-34. By making this broad claim – without regard for whether such disclosure requirements occur in the special context of campaign finance – however, Petitioners ignore the special interests underlying campaign finance disclosure laws, as explained above.

The United States Constitution embodies the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."). Accordingly, as

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[10] The Petitioner's complaint has two counts -- the first broadly alleges that the disclosure law is unconstitutional as applied to referendum petitions, the second alleges that the disclosure law is unconstitutional as applied to Petitioners because they face a reasonable probability of harassment Pet. Br. That second count was not reached by either lower court and is thus not before the Court in this appeal of the preliminary injunction motion. Pet. Br. at 10-14.

a general rule, the mere possibility of reprisal in response to political speech does not justify depriving voters of valuable information about campaign-related spending. *See Buckley*, 424 U.S. at 68 (acknowledging that disclosure may prevent some individuals from engaging in political activity and may subject others to harassment or retaliation); *see also McConnell*, 251 F. Supp. 2d at 247 (D.D.C. 2003) ("Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court."). While actual intimidation and harassment are reprehensible, and robust anti-intimidation and harassment laws can and should deter and punish such conduct, cloaking political spending in anonymity would undermine other values of constitutional significance. What this Court said seventy years ago remains equally true today:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the

> probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

In rare situations, however, exemption from disclosure may be necessary to protect the First Amendment freedoms of particular groups or individuals and prevent the "consequent reduction in the free circulation of ideas." *Buckley v. Valeo*, 424 U.S. at 71. To warrant exemption, those seeking an exception must first show a "reasonable probability" that they will face "threats, harassment, or reprisals" as a result of disclosure. *Citizens United*, Slip. Op at 54. If a reasonable probability of harm is established, then the Court undertakes a balancing test to determine whether "the threat to the exercise of First Amendment rights is so serious" that it outweighs the state's interest in the contested disclosure. *Buckley v. Valeo*, 424 U.S. at 71; *see also NAACP v. Alabama*, 357 U.S. 449, 466 (1958). This inquiry is necessarily highly sensitive to the facts and circumstances of each case. *See, e.g., Buckley v. Valeo*, 424 U.S. at 71-74 (examining record and refusing to apply blanket exception for minor parties due to myriad factors affecting whether exception is appropriate).

In the campaign finance context, because of the several compelling state interests implicated, the threat to First Amendment rights must be substantial in order to tip the balance of equities in favor of exemption. For example, in *Brown v.*

Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982), after reviewing an extensive record of pervasive and extreme harassment against plaintiff Socialist Workers Party and its members, the Court concluded that:

> [T]he District Court properly concluded that the evidence of private and government hostility toward the SWP and its members establishes a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. There were numerous instances of recent harassment of the SWP both in Ohio and in other states. There was also considerable evidence of past government harassment . . . [T]he evidence suggests that hostility toward the SWP is ingrained and likely to continue.

Id. at 100-101. Not surprisingly, the Court has only once found cause for an exception from campaign finance disclosure laws due to harassment. *Compare Brown*, 459 U.S. at 101-102 *with Citizens United*, Slip Op. at 54-55 (rejecting claim for exemption from disclosure); *McConnell*, 540 U.S. at 199 (refusing to exempt parties from disclosure despite their "expressed concerns" of harassment); *Buckley v. Valeo*, 424 U.S. at 69-74 (concluding that the "substantial public interest in disclosure" "outweighs the harm generally alleged").

Amici do not attempt to assess whether the particular fears of reprisal alleged by Petitioners here do or do not warrant an exemption from the Act at issue today. *Amici* do, however, submit that if this Court were to issue such an exemption – on the grounds that the First Amendment protects the anonymity of petition signatures – such a ruling should not extend to the sphere of campaign finance disclosures.

CONCLUSION

Because we believe that a constitutional democracy cannot deprive the electorate of the tools and knowledge to educate itself about the forces operating in the political arena – the most basic facts about the funding of candidates, elections, and referenda, we urge this Court to craft a resolution to the dispute before it in this particular case without impinging upon existing constitutional doctrine regarding disclosure laws in the sphere of money in politics.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2,
AND PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, AND
BRENDA GALARAZA, PUBLIC RECORDS OFFICER FOR
THE SECRETARY OF STATE'S OFFICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it addresses the freedom of association, which ensures the effective exercise of our First Amendment rights.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

The freedom of association ensures the effective exercise of the rights guaranteed by the First Amendment, especially with regard to controversial issues or viewpoints. For this reason, the right to associational privacy cannot be abrogated without a compelling state interest. Here, unlike in the campaign finance context, the state interests fall far short of compelling, and can easily be satisfied without mandatory full disclosure of the identity and contact information of every citizen who signs a petition. Further, as illustrated in campaign finance law, exemption from full disclosure—which is a constitutionally mandatory remedy, not a substitute for strict scrutiny—is not a reliable mechanism. Exemption rules chill speech by their very nature as an ad hoc process untethered from any fixed standards. Consistent with the right to private association undergirding the First Amendment, the Court should establish a bright-line rule prohibiting the mandatory full disclosure of petition signers' identities and contact information.

ARGUMENT

The issue before the Court in this case is a familiar one: the right to private association. Faced with far more persuasive state interests supporting the disclosure of federal campaign contributions, this Court has nonetheless made clear that minor political parties must be exempt from reporting requirements. An analogous exemption would be required if the Court accepts that Respondents have a compelling interest.

But therein lies the problem. While creating and administering a constitutionally mandated disclosure exemption sounds straightforward in theory, in practice it is anything but. Permitting legislative and executive officers to pick and choose which groups deserve an exemption quickly devolves into a standardless exercise, thereby chilling the exercise of First Amendment rights.

We urge the Court to refrain from creating yet another disclosure system with yet another obligatory—but wholly standardless—exemption. Because the state interests here are far from compelling, under traditional strict scrutiny principles the Court should establish a bright-line rule prohibiting full, involuntary disclosure of all petition signers' identities and contact information.

I. EVEN IF THE REASONS FOR PUBLIC DISCLOSURE ARE COMPELLING, EXEMPTIONS ARE CONSTITUTIONALLY REQUIRED WHEN DISCLOSURE EQUATES TO RESTRAINT.

In circumstances where a sufficiently compelling state interest otherwise overcomes public disclosure provisions' burdens on First Amendment rights, for example in the campaign finance arena, this Court requires exemptions for minor political parties and other groups if they can show an objectively reasonable fear of intimidation. *See Buckley v. Valeo*, 424 U.S. 1, 71 (1976); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). In making this determination, the Court endorsed a balancing test of sorts, ul-

timately concluding in *Socialist Workers* that the First Amendment prohibits a state "from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment or reprisals," because "[s]uch disclosures would infringe the First Amendment rights of the party and its members and supporters." *Id.* at 101-02. Mandatory disclosure always burdens associational rights; an exemption, however, is constitutionally mandatory when disclosure equates to silence or restraint.

A. Groups Supporting Controversial Positions Must Be Protected.

The rule initially articulated in *Buckley* and amplified in *Socialist Workers* is well founded, especially for citizens supporting controversial positions or candidates. *See, e.g.*, *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 498 (1985) ("[O]ne of the essential features of democracy is the presentation to the electorate of varying points of view."). "History has amply proved the virtue of political activity by minority, dissident groups[.]" *NAACP v. Button*, 371 U.S. 415, 431 (1963) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (plurality opinion)). Thus, "no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004).

The Court has articulated this "bedrock principle underlying the First Amendment" in no uncertain terms: "[T]he government may not prohibit the expression of an idea simply because society finds the idea

itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting authorities); *see also id.* at 420-21 (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."). "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). The constitutionally proper remedy for speech one finds reprehensible is to engage it directly:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Put another way, our First Amendment freedoms must be protected by more than temporarily prevailing

political winds. *See, e.g., W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."). Americans "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted). As shown below, for groups speaking on highly charged issues or advocating controversial opinions, those absolute protections are all the more crucial because uncertainty discourages association in the first place.

B. Publicly Disclosing a Group's Members or a Citizen's Affiliations Can Equate to Restraining Their First Amendment Rights, Particularly for Those Speaking on Contentious Issues or Espousing Controversial Viewpoints.

Where controversial issues are concerned, the need for *private* association is acute. The fear of public censure chills individuals from associating, hamstringing their other First Amendment freedoms. As one scholar has noted, in these situations associational privacy gives "groups freedom for self-development and group

interaction without undue impingement by the norms of the majority." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Against Disclosure*, 53 DUKE L.J. 967, 995 (2003).

The freedom of association enables groups and citizens to participate meaningfully in public life. It "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *see also* Solove, 53 DUKE L.J. at 995 ("Freedom of association guards against the 'tyranny of the majority,' for it allows those with minority viewpoints to form into groups to achieve greater social power."). The Court has observed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association[.]" *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Thus, courts often must safeguard associational rights. *Cf. Button*, 371 U.S. at 429 ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."). The "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462.

In the United States, governmental actors are not responsible for coercively promoting or denigrating certain viewpoints. It is axiomatic that "the State may not restrict speech or association simply because it finds the views expressed by any group to be abhor-

rent." *Healy v. James*, 408 U.S. 169, 187-88 (1972) (overturning college's refusal to allow Students for a Democratic Society to use campus facilities). The First Amendment certainly does not contain an exception "for the expression of extremely unpopular and wrong-headed views." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). On the contrary, advocating a "politically controversial viewpoint [ ] is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Clearly, Respondents may not bluntly prohibit Petitioners from exercising their rights to associate or petition their government on this issue of tremendous public interest. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."). But public disclosure by the State of citizens' organizational affiliation would be tantamount to governmental suppression of the viewpoint when, as here, threat of disclosure causes citizens to abstain from associating, for example because of a fear of ensuing public reprobation and censure. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved." *Patterson*, 357 U.S. at 462.

Hence, the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.*; *see also Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960) ("Public exposure [of a public school teacher's organizational affiliations], bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty."). The Court thus has held that a state cannot force its citizens to divulge their organizational affiliations, or force groups to divulge their members, when doing so would impair associational freedom, and when, as here, the state's regulatory or administrative interests easily can be satisfied short of full disclosure. *See, e.g.*, *Shelton*, 364 U.S. at 490; *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (NAACP membership lists exempt from ordinance requiring corporations to identify all persons paying dues, assessments, and contributions); *Patterson*, 357 U.S. at 466.

Although the analysis in these sorts of cases is necessarily fact-based, the underlying principles are timeless. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 145 (1951) (Black, J., concurring) ("[S]ince prejudice manifests itself in much the same way in every age and country and since what has happened before can happen again, it surely should not be amiss to call attention to what has occurred when dominant governmental groups have been left free to give uncontrolled rein to their prejudices

against unorthodox minorities."). Even in the face of compelling state interests, a public disclosure rule must have an exemption for reasonable fear of intimidation lest the regulation cross the line from lawful disclosure to illicit restraint. But this begs the question whether the exemption is adequate without a compelling state interest to justify public disclosure in the first instance.

II. DISCLOSURE EXEMPTIONS ARE NOT A SUBSTITUTE FOR STRICT SCRUTINY AND PROVIDE INADEQUATE PROTECTION WHERE DISCLOSURE IS NOT JUSTIFIED BY COMPELLING STATE INTERESTS.

The Constitution requires disclosure exemptions in certain circumstances, even when a compelling state interest justifies mandatory disclosure. *See Socialist Workers*, 459 U.S. at 93-94 (quoting *Buckley*, 424 U.S. at 74). But those exemptions are a consequence of strict scrutiny, not a substitute for it; a headlong rush to the exemption, without first weighing the state interests, puts the cart before the horse. Where, as here, no compelling state interest justifies disclosure, the right to private association remains absolute. Moreover, administering these exemptions further burdens the right to association in a way that—while tolerable to combat corruption in the campaign finance context, for example—is decidedly intolerable in the absence of any compelling state interest that could justify disclosing the identities *and contact information* of citizens petitioning their government.

A. The Government Is Ill-Suited to Identify Which Groups Should Be Exempt From Disclosure.

A group espousing one point of view on a controversial issue may not harness the power of the state to silence its opponents. Examples abound in this Court's jurisprudence of overreaching by executive or legislative actors to suppress expression, so it is doubtful that these same officials can be trusted to enforce a disclosure exemption in this context or in any other. *See, e.g.*, *R.A.V.*, 505 U.S. 377 (overturning Minnesota law against cross burning); *Johnson*, 491 U.S. 397 (overturning Texas law prohibiting flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam) (overturning a Washington flag law where petitioner expressed opposition to the Vietnam War and events at Kent State University); *Schacht v. United States*, 398 U.S. 58 (1970) (overturning portion of a federal law prohibiting criticism of the armed forces); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (overturning state criminal syndicalism statute used to prosecute a participant at a Ku Klux Klan meeting at which there was no incitement to violence); *Barnette*, 319 U.S. 624 (war-time decision overturning state law compelling recitation of the Pledge of Allegiance). As these cases demonstrate, the states and the federal government at best have a questionable track record when determining which expression should and should not be permitted, as the Court recently recognized. *See Citizens United v. FEC*, 130 S. Ct. 876, 896-97 (2010). And the greater includes the lesser: if the associational rights of the above persons and groups are

fully protected, then Petitioners are entitled to nothing less.

For example, the federal government began its quest to outlaw flag burning because of the effect on the morale of the soldiers fighting in Vietnam. *See, e.g., Johnson*, 491 U.S. at 426-27 (Rehnquist, C.J., dissenting) (outlining legislative background). But the issue remained long after the Vietnam War had ended. The Court eventually overturned Texas' flag-burning prohibition on First Amendment grounds. *Id.* at 420.

Undeterred, Congress promptly passed the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989) (the "FPA"). The FPA prescribed criminal penalties for whomever "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States." 18 U.S.C. § 700(a) (1988 ed. & Supp. I). This was the same conduct *Johnson* held is constitutionally protected.

Invalidating the FPA shortly after its enactment, the Court relied in large part on the previous Term's decision in *Johnson*. *See United States v. Eichman*, 496 U.S. 310, 317-19 (1990). Rejecting the notion that even a national consensus can trump the First Amendment, the Court in *Eichman* concluded, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *Id.*; *see also Schacht*, 398 U.S. at 63 ([A] law "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison

for opposing it, cannot survive in a country which has the First Amendment."). If the national consensus against flag burning could not trump the First Amendment in *Johnson*, then surely Petitioners' freedom of association should remain untrammeled in petitioning their government on a polarizing, hotly-debated issue.

The Court's decisions in *Johnson* and *Eichman* illustrate the need for absolute First Amendment protections. The government's history of erroneously suppressing controversial or unpopular expression—notwithstanding a decision of this Court rejecting a nearly identical proscription—shows it is ill-suited to grant or reserve a group's First Amendment rights based on its subjective judgment regarding a nebulous exemption. It is easy to say that an exemption to the general rule would be required; it is much harder to determine who would make such decisions and to trust their determinations would be unbiased. More importantly, the exemption does not eliminate or lessen the burden public disclosure places on First Amendment rights, thereby inviting intermediate scrutiny or even rational basis review. To the contrary, even when an underlying state interest is sufficiently compelling to justify disclosure, the exemption is nevertheless constitutionally necessary when disclosure amounts to restraint. The exemption does not replace strict scrutiny; indeed, it is wholly inapplicable where, as here, no compelling state interest exists in favor of full disclosure.

B. In the Federal Election Context, the Process for Requesting a Reporting Exemption Is Onerous and Devoid of Standards.

The process developed by the FEC to administer the constitutionally mandated disclosure exemption in the campaign finance context highlights the attendant chilling effects, and illustrates why a similar exemption for petition signers cannot replace strict scrutiny. Four times between 1990 and 2009, the Socialist Workers Party ("SWP") has received an exemption from disclosing the "names, addresses, and other identifying information of contributors to and vendors doing business with the SWP and committees supporting SWP candidates in connection with Federal elections." *See* FEC Advisory Ops. 1990-13, 1996-46, 2003-02 & 2009-01. "The [FEC] granted these renewals after examining the evidence presented in affidavits and other documents describing the continuing harassment of the SWP and its supporters during the six years preceding each request." Advisory Op. 2009-1. The FEC did so, in part, based upon its unilateral judgment that the SWP was electorally ineffective, poorly funded, and therefore a politically irrelevant speaker.[2]

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[2] See the following statements from Advisory Opinion 2009-1:

> [N]o SWP candidate has ever been elected to public office in a partisan election. Data from the 2004, 2006, and 2008 elections show very low vote totals for SWP presidential and other Federal candidates. Information presented in the request and available on the Commission's website indicates a low level of financial activity

But the advisory opinion process comes with significant administrative burdens and provides no guarantees for minor parties seeking an FEC exemption. To begin with, a requestor cannot expect a speedy decision. Commissioners are not required to issue an opinion until 60 days after a "qualified and complete" request has been submitted. 11 C.F.R. § 112.4(c). Requestors must "set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future" and give a "complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." *Id.* § 112.1(b), (c). This enables the FEC routinely to delay the issuance of opinions as its General Counsel seeks ever-more-relevant facts, by ten days per round of questions. *Id.* § 112.1(d). Consequently, the delay itself deters speaking—as it would in any similar proceeding overseen by a court or state administrative body.

In addition, a requestor for an exemption may not seek it from the FEC in private. Instead, requests for advisory opinions are "made public at the Commission promptly upon their receipt," *id.* § 112.2(a), including on the FEC's website. Written comments in response to the request for an opinion are also made public. Consequently, someone who faces a reasonable prob-

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by SWP political committees. Further, unlike committees of several other minor parties, the SWP National Campaign Committee has never applied or qualified for national committee status.

(Citations omitted.)

ability of threats, harassment or reprisal only exacerbates the risk by asking the FEC for an exemption from disclosure. This entirely public forum provides cold comfort to the controversial political speaker, even if the exemption is eventually granted. In the petition-signing context, any similar requirement would swallow the exemption entirely, rendering it moot.

Finally, and most important, there are no objective minimum regulatory standards or thresholds by which the FEC decides whether a requestor faces an objective risk of threats, harassment or reprisal. It is an entirely ad hoc and subjective decision-making process. Indeed, the FEC, granting the SWP its most recent waiver in Advisory Opinion 2009-01, characterized the evidence of harassment as waning and ominously warned that this may be SWP's last exemption:

> Although the evidence presented by the requestor demonstrates some continued incidents of violence and harassment, *those incidents appear to be of lesser magnitude* than those referenced in court opinions and prior AOs granting the exemption. The interest of disclosure, however, is weighed against both the historical and present day evidence of violence and harassment. As the number of severe incidents decline, *it may become more difficult for the requestor to demonstrate* a "reasonable probability that compelled disclosure" will result in "threats, harassment, or reprisals from either Government officials or private parties. [Emphasis added.]

This is a troubling forecast and certainly not encouraging to those would-be individual or entity speakers who may consider seeking an exemption from the FEC, especially in light of only part of the extensive evidentiary record set forth by the SWP describing threats of violence from private parties:

> The SWP submitted approximately fifty exhibits consisting of attestations as to incidents of harassment, threats, or violence by private individuals or businesses . . . .
>
> Thirteen exhibits described acts of violence or vandalism against SWP workers, property, or materials, including an incident in 2004 when a brick wrapped in incendiary material was thrown through the window of a local SWP headquarters early in the morning, setting the front part of the building on fire and causing considerable damage. Other exhibits described other incidents of violence or vandalism, including pouring paint over an SWP vehicle; racist, anti-gay, or anti-immigrant graffiti on the windows of SWP campaign offices; a threat of imminent bodily harm to SWP campaigners; a physical assault on an SWP worker at a campaign literature table; a piece of concrete thrown through the window of an SWP office in an attempted break-in; extensive egg-throwing at an SWP headquarters on a street where no other businesses or offices were vandalized; and a former head of personnel at a

> company engaged in disputes with SWP personnel racing his car at an SWP campaigner.
>
> Several exhibits described more generalized threats of harm made in person to SWP campaigners, such as a statement by an individual to SWP supporters seeking ballot signatures that he wished to "put a bullet in every one of your heads." Eleven exhibits allege threatening or hostile statements made by mail or by phone. Some of these examples merely involve insulting messages containing harsh language or questioning the SWP's loyalty to the U.S. They are not out of the ordinary experience of campaigns today. However, there are more alarming allegations, such as a threatening letter containing a syringe mailed to an SWP office. There was also a declaration describing a threat by an individual to shoot SWP workers who came to his door. [Exhibit number omitted.]

Id. Common sense dictates that this level of harassment and abuse clearly tips the scales in favor of the SWP's right to private association. But the fact that the FEC considers this evidence of waning harassment that just barely justifies the constitutionally mandatory disclosure exemption highlights the standardless, ad hoc nature of the entire exercise—and would alarm groups hoping for disclosure exemptions in the present circumstances as well.

In sum, the process by which prospective speakers seek an exemption from the campaign finance disclo-

sure requirements—even where the Court has found a compelling state interest—is riddled with stifling delay, counterintuitive and self-defeating publicity, and tremendous potential for arbitrariness. Consequently, there is no real basis for any kind of confidence that the FEC will review the allegations with objectivity. Respondents' invitation to bypass strict scrutiny in favor of a similar exemption here would result in states developing equally vague processes to determine when petition signers' names and identifying information should be exempt from disclosure.

The point here is not to challenge the campaign finance disclosure provisions this Court very recently upheld, but rather to emphasize that public disclosure carries significant burdens and manifestly chills the exercise of First Amendment rights in a way that is unconstitutional where not outweighed by a compelling state interest. Undoubtedly, citizens presented with a petition on a controversial issue would not even consider signing it if faced with the uncertainty of proving an objectively reasonable fear of intimidation or retaliation to the government's satisfaction. Participation would be weakest on the most controversial or contested issues—precisely the context in which it should be most robust—and petitioning would lose value as a tool for citizens to participate directly in their government and for government to gauge public support for policies. That chilling effect, even if tolerable to combat actual and apparent corruption in the campaign finance context, nevertheless unconstitutionally infringes petitioners' First Amendment rights when no compelling state interests exist in favor of

publicly disclosing the identities and contact information of citizens signing particular petitions.

CONCLUSION

In addition to being burdensome and standardless, the intimidation exemption is irrelevant because there is no compelling state interest in full disclosure of all petition signers' names and identifying information. Further, there are many less intrusive ways to verify that petitions meet state law ballot access requirements. The Court thus should adopt a bright-line rule protecting petition signers' right to private association.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,
Petitioners,

v.

SAM REED *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M. Hoersting, a campaign finance attorney and former

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

This Court has made clear that any activity that furthers candidate campaigns for elective office must be disclosed. *Citizens United v. Fed. Election Comm'n,* No. 08-205, slip op. at 50–55, 558 U.S. __, 2010 WL 183856 (Jan. 21, 2010).

The Court must now make clear that the constitutional line between publicly disclosed activity and anonymous speech and association is not to be drawn between elections and issues. The line already drawn, and to be respected and preserved, is between candidate elections on the one hand, and elections about issues and issue advocacy on the other.

Like mandatory disclosure in candidate elections, anonymity in issue elections and referenda protect citizens from corruption and abuse from officeholders or opponents who would punish citizens for opposing their policy preferences. Citizens learn something of the relative merits of a candidate by knowing who supports him; candidates, possessing freewill, may change positions after the election to reward election contributors. But citizens learn little about the relative merits of policy referenda by knowing which of their fellow citizens supports it—and abusive officeholders and opponents learn too much.

Mandatory disclosure always carries costs. Recent history demonstrates that donors to ballot proposition campaigns are subjected to retribution by officials and others who make use, either directly or derivatively, of government-compelled disclosure data.

Where disclosure of political speech furthers compelling interests, as in candidate elections, the burdens disclosure places on political speech may be justified, with limited exception. *See generally Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). And filing privately with the Washington State officials allows the government to investigate and prevent fraud. Where, however, mandatory disclosure does not further compelling interests, as in the case of ballot issue advocacy and referenda, the impositions on First Amendment rights are not justifiable. Mandatory disclosure of ballot issue advocacy would further none of the informational, anti-corruption, or compliance interests enunciated in *Buckley* and *McConnell*.

In *Buckley*, this Court permitted mandatory disclosure of independent express advocacy of candidates in order to further "informational" (but not anti-corruption) interests. The Court conditioned this allowance of mandatory disclosure on its being constitutionally narrowed to avoid issue advocacy. *Buckley v. Valeo*, 424 U.S. 1, 79–80 (1976). The government's claim that ballot issue advocacy can now be subject to compelled disclosure to further the same informational interest constitutes a "constitutional 'bait and switch.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, ("*WRTL II*"), 551 U.S. 449, 127 S.Ct. 2652, 2673 (2007).

Because the petition signature disclosure provisions are unconstitutional as-applied to any petition signer,

the Doe plaintiffs need not demonstrate a "reasonable probability" that they will suffer "threats, harassment, and reprisals" under *Brown*.

ARGUMENT

I. INTRODUCTION

This Court has made clear that any activity that furthers candidate campaigns to elective office must be disclosed. *Citizens United*, slip op. at 50–55. This is the upshot of *McConnell* and *Citizens United*. The Court accepted Congress' assertion that the full range of electioneering communication provisions further elections for purposes of disclosure. But, the Court held, the electioneering communication's ability to further elections was no basis for banning their funding by corporate sources. *Id.* at 50.

The Court must now make clear that the constitutional line between publicly disclosed activity and anonymous speech and association is not to be drawn between elections and issues. The line already drawn, and to be respected and preserved, is between candidate elections on the one hand, and elections about issues and issue advocacy on the other.[2]

To compel public disclosure in issue campaigns—such as ballot propositions, initiatives, or referenda—is tantamount to opening needlessly the secret ballot, for there is little difference between the public

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[2] *Amicus* CCP concedes that a candidate recall initiative may compel a different result, because the recall of a candidate may be the equivalent of an additional candidate election. But while the election is about issues—as is clearly the case with Washington's R-71 referendum—anonymity, not public disclosure, must be protected to protect the democratic process from gradual destruction.

knowing who signed a petition for a ballot initiative and who voted for one.

Furthermore, to compel public disclosure in issue campaigns is to elevate unwisely and shamefully the *ad hominem* argument to a constitutional command. It offends, let alone endangers, the American system of popular sovereignty to state that Americans cannot know *what* they think of same-sex marriage initiatives (or any other ballot issue) without knowing precisely *who* supports same-sex marriage. Ballot initiatives, unlike candidates for office possessing freewill, are words on a page. They do not change once enacted in the way a candidate changes positions once elected. "The premise of our system" of popular sovereignty "is that the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting); overruled in *Citizens United*, slip op. at 50. Once the Doe plaintiffs have disclosed privately to Washington authorities to prevent fraud, the informational and anti-corruption interests of *Buckley* are not furthered by public disclosure. Indeed, the anti-corruption interest is better served by anonymity, as the recent California Prop 8 pushback demonstrates, as only the latest example.

II. LIKE DISCLOSURE IN CANDIDATE ELECTIONS, ANONYMITY BEYOND CANDIDATE ELECTIONS PROTECTS CITIZENS FROM CORRUPT OFFICE-HOLDERS AND ABUSIVE OPPONENTS

In proposals to disclose ballot issue referenda, we witness two canons of political law on an apparent collision course: that government corruption is cured by disclosure; and that the right of individuals to

speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one because these canons, applied in context, each work toward the same purpose: to protect citizens from corrupt and abusive officeholders and hostile opponents. Anonymity in ballot issue referenda, like disclosure in candidate elections, advances the overriding government interest at the root of all campaign finance regulation: preventing corruption or its appearance. *Buckley*, 424 U.S. at 25.

Many believe that "[l]iberty cannot be preserved without a general knowledge among the people." John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE (1765), *reprinted in* Thomas Paine, *Common Sense* 99, 108–10 (Edward Larkin ed., Broadview Press 2004). But many have missed the import in Adams's full quote: "Liberty cannot be preserved without a general knowledge among the people, who have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean *the characters and conduct of their rulers*." Adams, *supra* (emphasis added). Far from benefiting democracy, mandatory disclosure is harmful when it illuminates the inner workings of communication by and between citizens about issues and referenda, potentially subjecting those citizens to both official and unofficial harassment and intimidation. Because mandatory disclosure for ballot issue advocacy does not illuminate the characters or conduct of public officials, any public interest in such disclosure is substantially diminished. Mandatory disclosure improperly applied in this way becomes a tool of abuse by government and hostile opponents, rather than a tool to prevent abuse of government.

Proper disclosure schemes, like those for candidate campaign contributions, protect citizens from abuse of office by officials who have freewill and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for direct lobbying activities, in which paid consultants engaged in face-to-face meetings with officeholders, protect citizens in a similar manner. Disclosure of ballot issues, however, does not further these goals. Rather, protecting the right to speak and associate anonymously with fellow citizens in referenda elections (not candidate elections) protects citizens from abusive officeholders or hostile opponents by reducing the officeholder's ability to retaliate against those who would oppose his policy preferences. Anonymity for activity short of candidate elections is supported by a long line of cases. *See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton,* 536 U.S. 150, 166, 168 (2002) (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341–42 (1995)) ("'[d]ecision to favor anonymity may be motivated by fear of economic or official retaliation'"); *Talley v. California,* 362 U.S. 60, 64–65 (1960) ("[g]roups and sects . . . throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," and "identification and fear of reprisal might deter . . . discussions of public matters of importance").

Further, citizens learn something of the relative merits of a candidate by knowing who supports his election. The "sources of a *candidate's* financial support . . . alert the voter to the interests to which a *candidate* is most likely to be responsive." *Buckley,* 424 U.S. at 66–68 (emphasis added). Compelling disclosure of those sources "facilitate[s] predictions of future performance in office[,]" and "may discourage

those who would use money for improper purposes . . . before or after the election." *Id.* at 67. And citizens learn much about the legislative process by knowing who is paying consultants to meet with officeholders directly. *See* Lobbying Disclosure Act of 1995, 109 Stat. 691 (codified at 2 U.S.C. § 1601 *et seq.*). Citizens, however, learn little about the relative merits of a referendum by knowing which of his fellow citizens supports it. Referenda do not change once enacted; little "informational interest" is furthered. Asserting otherwise is an argument from *ad hominem* that does little to advance knowledge or debate. Abusive officeholders and hostile opponents, however, are provided with too much information—the information needed to abuse their official position or to retaliate against political opposition. Disclosure regimes for issue advocacy provide abusive officeholders and opponents with knowledge of which individuals support which issues. The possibilities for retaliation and intimidation impose too high a cost for too little benefit in our constitutional republic, which depends for its survival upon a vibrant and "unfettered interchange of ideas." *Roth v. United States*, 354 U.S. 476, 484 (1957).

III. THE DANGER OF RETRIBUTION IS REAL

This Court has been reminded, of late, of the hoary tale: politics coincides with retribution or threats of it. *See Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (per curiam) (staying broadcast of Proposition 8 trial; recognizing harassment directed at Proposition 8 supporters). Political retribution is ubiquitous. The role of the Court is to diminish retribution by protecting anonymity where public disclosure would

further no important or compelling government interest.

The Doe Plaintiffs may have to disclose their names privately to Washington state officials to aid in the policing of fraud. But once fraud is addressed, public disclosure cannot vindicate the anti-corruption and informational interests discussed in *Buckley*. Public disclosure furthers these interests only for candidate campaigns.

IV. COMPELLING PUBLIC DISCLOSURE OF REFERENDA SIGNERS FURTHERS NO IMPORTANT OR COMPELLING GOVERNMENT INTEREST

The First Amendment provides the "broadest protection to . . . political expression" to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley*, 424 U.S. at 14 (quoting *Roth*, 354 U.S. at 484). This protection extends to "political association," individuals joining together to advocate for positions they believe in, "as well as to political expression." *Buckley*, 424 U.S. at 15. This Court "did not suggest" that the corruption interest "extend[s] beyond campaign speech" about candidates. *WRTL II*, 127 S. Ct. at 2672-73. *See also Buckley*, 424 U.S. at 80 (disclosure provision "[a]s narrowed . . . does not reach all partisan discussion[;] it only requires disclosure of . . . expenditures that expressly advocate a[n] election result" for candidates).

Accordingly, federal disclosure provisions for political speech, which are instructive in adjudicating state cases, have always been tied to elections. "The first federal disclosure law was enacted in 1910," reaching "political committees and . . . organizations

operating to influence congressional elections." *Id.* at 61 (internal citations omitted). The Federal Corrupt Practices Act of 1925 mandated disclosure for "political committees, defined as organizations that accept contributions or make expenditures 'for the purpose of influencing'" a Presidential campaign. *Buckley,* 424 U.S. at 62. Both laws were replaced by provisions in the Federal Election Campaign Act of 1971, as amended, *id.*, and Congress added to them in BCRA, legislation dedicated to the regulation of campaigns for federal office. *See generally McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

Similarly, in *United States v. Harriss,* 347 U.S. 612 (1954), this Court "upheld limited disclosure requirements for lobbyists," because "[t]he activities of lobbyists, who have *direct* access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre*, 514 U.S. at 357 n.20 (emphasis added). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.* (requiring lobbyists to make detailed disclosures about their direct lobbying efforts), operates to cure the same appearance. The regulated lobbying activities do not include attempts to advocate issues or referenda with fellow citizens. Rather they are "'representations made directly to the Congress, its members, or its committees' . . . and do[] not reach . . . attempts 'to saturate the thinking of the community.'" *United States v. Rumely,* 345 U.S. 41, 47 (1953) (internal citations omitted).

Referenda signers pose no threat of *quid pro quo* corruption. Candidates (human beings with freewill) are not up for election in ballot referenda. Any potential for ballot petitioners to become part of a fraud is handled by private disclosure to the Secretary of State. *See* Petitioner's Brief at 14.

This leaves the Court to consider the informational interests first recognized and justified in *Buckley* and needed to depart from the norm of anonymity. It is plain that *Buckley's* informational interests apply only to those elections where it is possible to illuminate who supports candidates, candidates who can deviate from stated platforms and reward supporters once elected. The informational interests help to place candidates in the "political spectrum" more precisely than can be done by platforms and party affiliation. *Buckley,* 424 U.S. at 67. They have no application to referenda campaigns. (A different result may occur in the case of candidate-recall elections, as those may be viewed as an additional election for candidates to office. But that question is not before the Court in this case).

The first interest is the "informational interest." *Buckley*, 424 U.S. at 81. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent *by the candidate*' in order to aid the voters in evaluating *those* who seek federal office." *Id.* at 66–68 (emphasis added). The R-71 petition signatures in question are not speech about candidates, only referenda. Therefore, compelling Doe to disclose his true name will not provide the public with information as to "where political campaign money comes from" or on "how [money] is spent by [a] candidate." *Id.*

The second interest is to "deter actual corruption and [its] appearance . . . by exposing large contributions and expenditures to the light of publicity." *Id.* But the terms "contributions" and "expenditures" discussed in *Buckley* derive from the Federal Election Campaign Act of 1971, as amended, Pub. L. 92-225, Feb. 7, 1972. Each subsumes the phrase "made... for

the purpose of influencing an[] election" to federal office, *see* 2 U.S.C. §§ 431(8) & (9), and not for some other purpose. That "critical phrase" was narrowed in *Buckley's* discussion of the disclosure requirements at § 434(c) to express advocacy, which ensured that its reach was unambiguously related to candidate campaigns. 424 U.S. at 80–81. Candidates and officeholders are not corrupted by referenda campaigns.

The third interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 66–68, which are inapplicable to issue and referenda campaigns.

Thus, requiring the names and addresses of citizens engaged in ballot issue advocacy does not further any of the informational, anticorruption, or compliance interests upheld as compelling in *Buckley*. There is no government interest recognized by this Court that is furthered by mandatory disclosure of ballot advocacy.

V. THE QUESTION IS NOT CLOSED BY *BELLOTTI*

There is no apparent government interest recognized by this Court that is furthered by compelling the disclosure of political speech for or against referenda. This issue was discussed but not decided in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). *See McIntyre*, 514 U.S. at 353–54 (*Bellotti*'s comments "on the prophylactic effect of requiring the identification of the source of corporate advertising [for referenda elections]" were "*dicta*"). Some suggest that this Court already determined the constitutionality of disclosure in ballot-initiative campaigns in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it said, "[t]he

integrity of the political system will be adequately protected if contributors are identified in a public filing [and], if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299–300. The Court, however, did not. In *Citizens Against Rent Control*, the appellants challenged contribution limits to ballot initiative committees in Berkeley Ordinance § 203, and did not challenge the disclosure provisions of § 112. Therefore, when the City of Berkeley claimed that the contribution limits must be upheld as a "prophylactic measure to make known the identity of supporters and opponents of ballot measures," *see id.* at 298–99, this Court had no opportunity to decide whether Berkeley's § 112 was constitutional, or to decide whether the government may compel the disclosure of communications for or against ballot initiatives or referenda. *Id.* at 291–93 (explaining that only the contribution limitations and not the disclosure requirements, had been challenged).

Because candidates—human beings possessing freewill and a potential to be corrupted—are not on the ballot, compelling the disclosure of information on the funding of ballot initiatives or referenda does not "aid voters in evaluating those who seek federal office," *Buckley*, 424 U.S. at 66, and does not deter corruption. And, because this Court has invalidated limits on contributions to ballot-initiative committees as a restraint on the rights of speech and association, *see Citizens Against Rent Control*, 454 U.S. at 299, disclosure would not aid in the enforcement of contribution limits. *See Buckley*, 424 U.S. at 66–68.

As Chief Justice Rehnquist stated, reviewing another section of BCRA, "[i]n this noncandidate-related context, this goal" of enabling viewers to evaluate the message transmitted "is a far cry from the govern-

ment interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates." *McConnell*, 540 U.S. at 361–62 (Rehnquist, C.J., dissenting) (reviewing BCRA § 504, which amends federal communications law to require broadcast stations to keep records of requests to purchase airtime for issues of national importance).

Buckley's informational interest—reviewed as it was in the context of candidate campaigns—is not furthered by mandatory disclosure of issue advocacy, even in ballot-initiative or referenda campaigns. What did California's voters learn of the relative merits of same-sex versus traditional marriage, or of the wording and import of Proposition 8, by knowing that Richard Raddon gave $1500 to Yes on [Proposition] 8? *See* Rachel Abramowitz, *Film fest director resigns; Richard Raddon steps down over reaction to his support of Prop. 8.* L.A. TIMES, Nov. 26, 2008, at E1. *Amicus* suggests the answer is: Nothing. What did those eager to retaliate against the supporters of Prop. 8 learn? Everything they needed to know.

Justice Scalia, dissenting in *McIntyre*, has written that there is no "right" to engage in anonymous electioneering, *McIntyre*, 514 U.S. at 371–85 (Scalia, J., dissenting). To reach this conclusion, he addressed three questions: "[w]hether protection of the election process justifies limitations that cannot constitutionally be imposed generally," *id.* at 378; "[w]hether a 'right to anonymity' is such a prominent value . . . that even protection of the electoral process cannot be purchased at its expense," *id.* at 379; and finally "[w]hether the prohibition of anonymous campaigning is effective in protecting. . . democratic elections." *Id.* at 381.

First, it is true that compelling the identity of issue advocates "cannot constitutionally be imposed generally." *Id.* This makes it all the more important for this Court reaffirm the line between elections for candidates and elections for issues and referenda.

Second, Justice Thomas has written of the importance and "prominen[ce]" of anonymity in securing debate in and outside of issue elections. *See McIntyre*, 514 U.S. at 371 (Thomas, J., concurring) ("[W]eight of the historical evidence" indicates that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political . . . issues in anonymous fashion").

Third, it is the failure to protect anonymous campaigning in ballot initiatives and referenda that is killing democratic elections, not protecting them. *See* Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support,* SACRAMENTO BEE, Nov. 12, 2008, (available at <http://www.sacbee.com/1089/story/1391705.html>).

VI. THIS COURT HAS ALREADY INVALIDATED CONGRESSIONAL ATTEMPTS TO COMPEL THE DISCLOSURE OF ISSUE ADVOCACY ON CONSTITUTIONAL GROUNDS

Furthermore, this Court will not write on a blank slate. In *Buckley*, this Court narrowed the statutory definition of "political committee" to avoid *vagueness* and an *impermissible* intrusion into issue discussion. 424 U.S. at 79.[3] But the Court also narrowed the

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[3] The *Buckley* Court in protecting issue advocacy from disclosure was well aware that express advocacy and issue advocacy both have an "effect" on elections, and saw this fact as little reason to curtail issue advocacy. 424 U.S. at 42 ("the distinction

definition of "expenditure" in the Act's disclosure requirements for independent speakers to cure *overbreadth* and thus to prevent an *unconstitutional* intrusion into issue discussion.

> But when the maker of the expenditure is . . . an individual other than a candidate or a group other than a "political committee[,]" the *relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad*, we construe "expenditure" for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.*

Buckley, 424 U.S. at 79–80 (emphasis added) (footnote omitted). The Court noted that only through narrowing could the provision "bear[] a sufficient relationship to a substantial governmental interest," for § 434(e) would "not reach all partisan discussion" and would "only require[] disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80.

Indeed, the *Buckley* Court seemed proud that its narrowing would "increase[] the fund of information" by "shed[ding] the light of publicity on spending . . .

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between discussion of issues and candidates and advocacy of election or defeat . . . may often dissolve in practical application. Candidates . . . are intimately tied to public issues[,] campaign on the basis of their positions on . . . issues, [and the] campaigns themselves generate issues of public interest").

[that] would *not otherwise* be reported because it takes the form of independent expenditures." 424 U.S. at 81 (emphasis added). This extension, however, invokes Chief Justice Roberts's warning of the "constitutional 'bait and switch'" *WRTL II*, 127 S. Ct. at 2673. The potential for "bait and switch" is no less before this Court in its review of the ballot signature provisions here. *Buckley* saved the disclosure of independent expenditures from unconstitutionality only by ensuring that that disclosure would *not* reach issue advocacy under the government's asserted informational interest. It would be improper "bait and switch" to hold now that issue advocacy in ballot referenda must be disclosed to further the same interest.

VII. THE DOE PLAINTIFFS NEED NOT DEMONSTRATE THAT THEY WILL BE SUBJECT TO THREATS, HARASSMENT, OR REPRISALS BECAUSE COMPELLED PUBLIC DISCLOSURE IS UNCONSTITUTIONAL AS-APPLIED TO ANY BALLOT PETITION SIGNER

In *Brown v. Socialist Workers '74 Campaign Committee*, this Court had to determine whether an otherwise constitutional disclosure requirement, related to candidate elections, could be applied to a political party committee that "historically has been the object of harassment by government officials and private parties." 459 U.S. 87, 88 (1982). The Court affirmed the finding of the district court, following the rationale in *Buckley*. *See generally Brown*, 459 U.S. at 92–102. But Washington's referendum petition disclosure provisions are not otherwise valid disclosure provisions. Ballot issue referenda are not related to candidate elections. Therefore, the Doe

plaintiffs need not demonstrate a reasonable probability that they will be subject to threats, harassment, or reprisals by operation of the disclosure provisions. It is enough for the Doe plaintiffs to demonstrate that the disclosure provisions are unconstitutional as applied to any plaintiffs signing ballot petitions.

Furthermore, there are practical problems with *Brown*'s "reasonable probability" inquiry. People such as Proposition 8 supporter Richard Raddon did not know at the time they first decided to speak that they would be targeted, nor could they—and it is highly unlikely that any court would have granted their request to remain anonymous on the authority of *Brown*. But with the knowledge they could likely be targeted comes questions. Is each ballot signer supposed to march into court and say he or she is likely to face reprisals, or should he wait for ballot organizers to do so on his behalf? If he may proceed on his own, would the proceedings be sealed?

Have the activities of Accountable America now made it possible for any right-leaning ballot organizer or ballot signer to demonstrate a reasonable probability of threats, harassment, and intimidation? *See Brown*, 459 U.S. at 93–94, 98–102; Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, at A15. Surely such a demonstration, if successful, would swallow *Buckley's* rule and disclosure, even in candidate elections, for whole categories of contributors and donors. This is why such a broad demonstration will never be successful in a district court, and why the purported protection of *Brown* would be no comfort to signers of ballot initiative petitions—and why the threats, harassment, and intimidation from Accountable

Americas everywhere would proceed apace, with their targets including ballot petition signers.

This Court should resist the temptation to uphold mandatory disclosure for issue advocacy on the belief that *Brown* will provide adequate protection to the chilled donor.

The line this Court must affirm is between compelled public disclosure for candidate campaigns and anonymity for campaigns involving ballot issues and referenda.

CONCLUSION

For the foregoing reasons, the opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted

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March 4, 2010

AMICUS CURIAE BRIEF

MOTION FILED

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No. 09-559

In the

Supreme Court of the United States

JOHN DOE #1, et al.,

Petitioners,

v.

SAM REED,
Washington Secretary of State, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File Brief Amicus Curiae and Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amicus Center for Constitutional Jurisprudence has received consents to file this amicus brief from Petitioners, Respondent State of Washington, and Respondent Washington Families Standing Together. Amicus has yet to receive a response to its request for consent from Respondent Washington Coalition for Open Government, thus necessitating this motion.

The Center believes the issue before this court is one of special importance to the individual rights protected by the Constitution. If permitted, amicus will argue that the First Amendment was meant to protect political expression from threats of retribution and coercion. The freedom to speak out on controversial political issues and petition state government will be lost if the identity of petition-signers is made public. Any such publication merely invites private individuals and organizations to threaten and ultimately silence political opponents. From the secret ballot to the anonymous political pamphlet, however, the nation has sought to protect and encourage participation in the political process.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae.

DATED: March, 2010.

Respectfully submitted,

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QUESTION PRESENTED

Whether state public disclosure of identifying information about petition signers violates the First Amendment right to free expression by allowing private harassment and threats of reprisal.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the proposition that the Founders intended to encourage public expressions of politics without fear of private reprisal or harassment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

SUMMARY OF ARGUMENT

Throughout this Nation's history, the right to remain anonymous while engaging in political speech has been upheld to ensure that private threats of intimidation or retribution would not chill perfectly peaceful discussions of public importance. In fact, this practice of anonymous speech played a vital role in the involvement of our Founders, who published both the Federalist and Anti-Federalist papers under the protective veil of anonymity, when debating the merits of the proposed federal Consti-

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

tution. Without such protections, the Founders' writings may have been quelled by fears of private harassment and economic reprisal. Such stories of political participation represent but one example of the importance of anonymity to the free exchange of ideas.

To protect a robust freedom of speech on matters of governance, anonymity has been extended to speakers in a variety of contexts. The examples begin with the introduction of the secret ballot in the United States. Though not adopted nationwide until the presidential election of 1884, the secret ballot's safeguard against coercion and intimidation has been in use since the American Revolution.

Similarly, anonymous pamphleteering and anonymity in membership have been protected as fundamental to free political expression. From the earliest days of our nation, there has been recognition that political speech and participation must occasionally be protected by anonymity in order to avoid personal or economic reprisals.

In this case, the State of Washington has no legitimate interest of sufficient magnitude to justify the publication of the names of petition signers. In the absence of such a compelling state interest, the Washington Public Records Act must give way to the First Amendment.

I

ANONYMITY HAS LONG BEEN RECOGNIZED AS NECESSARY IN PROTECTING POLITICAL EXPRESSION AGAINST PRIVATE INTIMIDATION AND THREATS OF REPRISAL

Anonymity—the ability to conceal one's identity while communicating—enables the expression of political ideas, participation in the government process, membership in political associations, and the practice of religious belief without fear of private intimidation or public reprisal. The importance of protecting such speech is rooted in the recognition that anonymity shelters constitutionally-protected expressions and political associations from threats of intimidation or reprisal that might otherwise chill the protected speech. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 Stan. L. Rev. 1373, 1425 (2000); *United States v. United States Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 314 (1972).

From secret balloting to anonymous pamphleteering, the shield of anonymity has protected political speech and participation in the democratic processes of the country. This Court has reaffirmed the principle that sacrificing anonymity "might deter perfectly peaceful discussions of public matters of importance." *Talley v. California*, 362 U.S. 60, 65 (1960). *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 159 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960). The reason for this Court's continued protection of anonymous political speech is

the fear that without such protection, threats of private intimidation and harassment will chill individuals' constitutionally protected right of free expression. *McIntyre*, 514 U.S. at 341-42.

A. The Practice of Secret Balloting Demonstrates the Importance of Anonymity

This Court has noted that the tradition of anonymous political speech "is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *McIntyre*, 514 U.S. at 343. Since its universal adoption in 1884, secret balloting has long been considered as fundamental a right as any included in the Bill of Rights. However, the importance of secret balloting extends beyond the interest of the individual voter. Ballot secrecy also serves the important societal interests of a thriving democracy in obtaining the free exercise of the franchise and accurate voter opinion. *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352 (D.N.J. 1995). With concerns over bullying tactics delegitimizing election results the secret ballot became the ideal answer to quelling such actions by immunizing voters from private retribution through a veil of secrecy. "Indeed, the central thrust of the [secret] ballot is to allow a voter to express his or her preferences in private without fear of coercion from others." John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 488 (2003).

The secret ballot has assumed a central role in our concepts of democracy and ordered liberty. The

tradition of secrecy through the use of the secret ballot has the sanction of antiquity in this country coming by way of Europe. Charles B. Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 182 (1948). Early use of secret ballots in the United States was necessitated by the threat of the English government, prior to the American Revolution, to disclose the choice of each individual voter. *Id.* at 181-86.

The fear of government retribution was not the lone driving force behind the adoption of secret balloting. Rather, private intimidation and harassment targeted at participating voters was just as disconcerting. Some of the first examples of targeted viewpoint discrimination occurred in this country during the American Revolution. Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. Int'l L. Rev. 65, 93 (2007). Partisans supporting the revolution used violence, intimidation, confiscation of property, banishment, and political, economic, and social ostracism to persecute Loyalists for their political expression. *History in Dispute - American Revolution* 189 (Keith Krawczynksi et al. eds., 2003). *See also* Cynthia Crossen, *Colonists Who Opposed American Revolution All But Forgotten*, Wall St. J., July 4, 2006 (stating that during the American Revolution, "[v]iolence against loyalists wasn't uncommon").

In his speech of 1842, Lord Macaulay made note of private intimidation as a barrier to achieving legitimate election results when referring to election practices in the United States, claiming: "The

suffrage, to be exempt from the corruption of the wealthy and the violence of the powerful, must be secret." Lord Thomas Babington Macaulay, *The People's Charter: A Speech Delivered in the House of Commons* (May 3, 1842). Likewise, Rep. Mark B. Cohen, a Pennsylvania state legislator long active in election reform, highlighted the importance of secret ballots to combat such evils, stating, "The secret ballot guarantees that it is one's private opinion that counts. Open ballots are not truly free for those whose preferences defy the structures of power or friendship." Roxanne Jekot, CountTheVote.org, *Secret Ballot Compromised in Georgia!* (Dec. 6, 2005), *available at* http://votetrustusa.org./index.php?option=com_content&task=view&id=441&Itemid=113 (last visited Mar. 1, 2010) (quoting Rep. Mark B. Cohen, D-PA).

Without the protection of a secret ballot, citizens would be faced with the same evils and abuses that this Court has outlined when discussing the importance of anonymous political speech. Underlying those opinions is the Court's fear that without anonymity, citizens will be faced with harassment and intimidation at the hands of their neighbors. As this Court has observed, "an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Without the secret ballot, voter's voices would be chilled by the possibility of targeted intimidation tactics and harassment at the hands of their neighbors. Edward B. Moreton, Jr., *Voting By Mail*, 58 S. Cal. L. Rev. 1261, 1274 (1985).

Today, the custom of secret balloting is unquestioned and observed uniformly throughout the country. As the D.C. Circuit has observed, "In this country a person's right to vote secretly is inviolate." *Buckley v. Valeo*, 519 F.2d 821, 867 n.117 (D.C. Cir.), *aff'd in part & rev'd in part on other grounds*, 424 U.S. 1 (1975). As such, the secret ballot "'has been recognized as a fundamental right of constitutional undertones.'" *D'Aurizio*, 899 F. Supp. at 1359 (citation omitted). With the threat of foreign rule long behind, the focus of the secret ballot has shifted from fear of government reprisal to the protection of the voting citizenry vulnerable to harassment and reprisal from private individuals. By preventing attempts of private citizens to influence the voter by intimidation or bribery, a key aim of secret balloting has been to ensure that the voter can record a sincere choice. Nutting, *supra*, at 185.

Additionally, secret ballots have served similar roles in the workforce in determining union representation. In this context, the role of secret ballots has been to ensure the legitimacy of voting outcomes. Eve I. Klein et al., *The Employee Free Choice Act—What's an Employer to Do?*, 81 N.Y. St. B.J. 38, 39 (2009). The reason for such practices is identical to those espoused in support of secret balloting in general elections. There has been a documented history of intimidation tactics and harassment meant to coerce employees into either accepting or denying union representation. *Id.*

In order to avoid the chilling of employee expression, union voting has followed the lead of state and federal elections and relied upon the

protection of anonymity that secret ballots provide. *Id.* The secret ballot election affords unions an opportunity for informed voters to cast their ballot and voice their decision in a neutral and anonymous setting, free from judgment, intimidation, or fear of reprisal. *Id.* Without the protection of anonymity, union voting would slip into the fraudulent and coercive practices guaranteed by forced disclosure. *Id.*

Similar to secret ballot elections, the exercise of one's right of expression through the signing of petitions should be granted the same protection of anonymity. The same principles apply—there is a danger that private harassment will chill protected expression. In fact, in this case the right to vote is inextricably tied to petitioning to put the matter to a vote. Each act is dependent upon the other. Indeed, by signing the petition an individual has in many cases declared his position on the ultimate issue. *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). In this case there is also an express communicative element to the act of signing the petition. The petitions circulated stated that "by signing R-71 we can reverse that decision and protect marriage as between one man and one woman" and that one should "[s]ign R-71 to protect children." Petitioner's Brief at 21, *Reed v. Doe*, No. 09-559 (U.S. Feb. 25, 2010). There is no question that petition signers in this case were taking a position on a matter of political controversy.

Publication of the identities of the petition signers can lead to the type of private harassment and intimidation that would chill free speech. *See* John R. Lott Jr. & Bradley Smith, *Donor Disclosure*

Has Its Downsides, Wall St. J., Dec. 26, 2008, at A13 (describing how the director of the Los Angeles Film Festival was forced to resign after disclosure of political support led to opponents threatening to boycott and picket the next festival). *See also* Steve Lopez, *Prop. 8 Stance Upends Her Life*, L.A. Times, Dec. 14, 2008, at B1 (describing a manager of a family-owned business who had to resign after disclosure of political support because "throngs of [angry] protestors" repeatedly stood outside the restaurant and "shout[ed] 'shame on you' at customers").

If petition signatures are publicly disclosed, there is a substantial risk that "unpopular" decisions and stances will be driven suppressed by threats of disclosure. Without the protection of anonymous political speech applied to petition signatures, political participation and expression will cease to include and invite those fearful of private reprisals. Such principles are not just applicable to secret balloting, but have long been applied to cases of anonymous pamphleteering and membership.

B. Principles of Anonymous Political Speech Have Long Been Applied to Anonymous Pamphleteering, Which Played a Role in This Nation's Founding

One of the more storied traditions within the realm of public political discourse in the United States is the practice of anonymous pamphleteering. In the face of concerns for transparency, anonymous pamphleteering has been seen, not as a hindrance to the continued development of society and the United States as a republic, but as a helpful tool in that effort. This Court has recognized that "anonymous

pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Talley, 362 U.S. at 64.

These tools of free speech "indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *see* Willard Grosvenor Bleyer, *Main Currents in the History of American Journalism* 90-93 (1927). However, the tradition of anonymous political speech is most famously embodied in *The Federalist Papers*, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also published under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 The *Complete Anti-Federalist* (Herbert J. Storing ed., 1981). The fact that the authors of the Anti-Federalists remain unknown today demonstrates the fear that accompanies taking a position on controversial subjects. Had these authors not been able to publish anonymously, we may never have had the benefit of their participation in the great debate about our federal Constitution.

A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. *See Encyclopedia of Colonial and Revolutionary America* 220 (John Mack Faragher ed., 1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell v. McCormack*, 395 U.S. 486, 531 n.60 (1969).

Although those who practiced anonymous political speech were silent as to their true motivations, it has been inferred that the decision in favor of anonymity was motivated by fear of economic or official retaliation, concern about social ostracism, or merely a desire to preserve as much of one's privacy as possible. *McIntyre*, 514 U.S. at 341-42. Since many of these Founding authors continued to hide behind the veil of their pseudonyms long after the American Revolution, it seems that for them fear of private reprisal and social ostracism continued to motivate their wish for anonymity. "Whatever the motivation may be," the interest in continued unfettered political discourse "unquestionably outweighs any public interest in requiring disclosure as a condition of entry." *Id.* at 342. Indeed, anonymous publication permits the ideas expressed to stand on their own merit, apart from any prejudice against the author. *Id.*

These principles are evidenced upon a review of this nation's history where persecuted groups and minority sects have been able to choose how to criticize oppressive practices. *Talley*, 362 U.S. at 64. This Court has recognized that, without anonymity,

the fear of retribution would chill important speech and political participation. *Id.* at 65.

This historical evidence clearly reveals a "respected tradition of anonymity in the advocacy of political causes." *McIntyre*, 514 U.S. at 343. For, under our Constitution, "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *Id.* at 357. The right to anonymous political speech represents the choice made in the First Amendment to protect a robust political participation, without fear of reprisal. As Justice Stevens noted:

> It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357. It is in balancing the right of anonymous political speech against public concerns for transparency that society's weight in the value of free speech without fear of reprisal prevails. Those principles are especially important in this case. There is no significant interest in publication of the names of those that sign a petition to place a measure on the ballot any more than the publication

of individual ballot choices. The disclosure can only serve to deter participation in the political process—much the same as compelled disclosure of membership in a political association.

C. The Principles Behind the Protection of Political Association Membership Privacy Also Apply Here

This Court has held that there are times when States may not compel political associations to disclose the identities of their members. *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. State of Alabama*, 357 U.S. 449 (1958). In *Bates* and *NAACP*, this Court ruled that forced public disclosure of membership could chill political participation out of fear of reprisal. *Bates*, 361 U.S. at 524. This Court found that disclosure of names would lead to fear of community hostility and economic reprisals. *Id.* This Court also found that public disclosure would discourage new members from joining the organizations and induce former members to withdraw. *Id.* "This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names." *Bates*, 361 U.S. at 524 (citing *NAACP*, 357 U.S. at 463).

In this case, the act of signing petitions represents an individual's choice to participate in the political process. Just as the political association served as the mode of expression in *Bates*, the signing of the petition in this case serves a similar if not identical purpose. Through their signatures individuals are able to express their political preference for changes in the laws. Washington's

public records act policies must be balanced against these weighty constitutional principles.

II

CONSTITUTIONAL PRINCIPLES BEHIND THE SECRET BALLOT AND THE RIGHT TO ANONYMOUS POLITICAL SPEECH ALSO FORBID GOVERNMENT DISCLOSURE OF PETITION SIGNATURES

This Court has long recognized that anonymity is essential to the freedom to participate in dissident groups and to express unpopular views. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Talley*, 362 U.S. at 65; *NAACP*, 357 U.S. at 462. When identification requirements "extend beyond restrictions on time and place they chill discussion itself." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 628 (1976) (Brennan, J., concurring in part). The importance in anonymity lies in the speakers' ability to speak his message without fear of retaliation for voicing an unpopular viewpoint. The fear of reprisal that an identification requirement would engender "might deter perfectly peaceful discussions of public matters of importance." *Talley*, 362 U.S. at 65.

In this case the State of Washington contends that disclosure of the petition signatures is compelled by the Washington Public Records Act, Wash. Rev. Code § 42.56.001, *et seq.* Posting of David Ammons to *From Our Corner*, Wash. Sec'y of State Blogs, http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/07/r-71-update-signature-requests-pe

nding/ (July 28, 2009). However, such a disclosure by the government runs directly contrary to this Court's precedent in protecting political speech from threats of reprisal. To permit the state to disclose the identities of those who have petitioned their government will force those petitioners to face the same dangerous side effects facing pamphleteers, voters, and membership bodies.

This Court has already held that circulating petitions is political speech. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197 (1999) (*Buckley II*); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). *Buckley II* decided that the First Amendment protects circulation of an initiative petition because collecting signatures is "core political speech." *Buckley II*, 525 U.S. at 186. In *Meyer*, this Court declared that "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer*, 486 U.S. 421 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). The signing of an initiative petition as Petitioners have done in this case, "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* Such expression for change places petition signatures directly on par with other forms of anonymous political speech.

All include a conscientious decision to speak and thus act on an issue of personal importance. In voting, it is the decision of a citizen to take control through his guaranteed right of deciding his future by choosing to either affirm or disaffirm a particular issue. *Palmer v. Thompson*, 403 U.S. 217, 234 (1971). In pamphleteering, it is the decision to

express political viewpoints through written word. *See Talley*, 362 U.S. at 64. In membership, it is choosing to speak and act by joining others united by similar concerns. *See Bates*, 361 U.S. at 520. The act of petitioning the state for placement of a proposed law on the ballot is no different. In this sense, anonymity is central to the flourishing of a successful republic, because it permits engagement in ideas and beliefs without fear of retribution.

Anonymity is a necessary component in the people's ability to participate in the political process outside the watchful eye of their neighbors. Without the protection of anonymity, citizens' will be kept from freely participating in political expression. Without the protection of anonymity the threats of harassment and retaliation will chill political participation. As Justice Stevens wrote in discussing the balance of interests in anonymous speech, it is the interest of protecting the Bill of Rights and the First Amendment in particular, that "our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

CONCLUSION

Respondents ask this Court to "endorse a view of the First Amendment that subject citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.'" *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part, concurring in judgment in part, & dissenting in part) (quoting *Nixon v. Shrink Missouri*

Gov't PAC, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting)). At the core of the First Amendment is the right to participate in the political process. This Court ought not to countenance any chilling of that participation in the absence of the most compelling government interest. The interests behind Washington's public records law simply do not rise to such a level, and even if they did, a more narrowly-tailored means of advancing those interests could be devised that protects individuals against reprisal for their political participation.

DATED: March, 2010.

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AMICUS CURIAE BRIEF

No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON
SECRETARY OF STATE, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMICUS CURIAE THE CITY OF SEATTLE IN SUPPORT OF RESPONDENTS

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I. Introduction and Statement of Interest of Amicus Curiae

Amicus Curiae the City of Seattle is the largest city in the State of Washington. Seattle, like many of Washington's local jurisdictions, employs initiatives, referenda, and other ballot measures as part of its legislative process.[1] Not only do local ballot measures constitute an integral part of Seattle's legislative process, they also play a central role in the legislative processes of hundreds of other local jurisdictions in Washington.[2] Under Washington's Public Records Act ("PRA"),[3] ballot measure petitions are public documents subject to disclosure upon request. Keeping ballot measure petitions public enhances citizens' trust

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[1] "Ballot measure" refers collectively to initiatives, referenda, and other actions that require a petition by a certain number of registered voters to place a measure before the voters on a ballot.

[2] Washington's local jurisdictions include 281 cities and towns, 39 counties, and dozens of other local entities ranging from port districts to hospital districts to park and recreation districts to school districts. Most local jurisdictions in Washington do not use initiatives or referenda, *see* Municipal Research and Services Center of Washington, Cities and Counties That Have Powers of Initiative and Referendum (updated Oct. 2008), http://www.mrsc.org/library/InitRefList.aspx, but even jurisdictions that do not use initiatives and referenda are still subject to other types of ballot measure petitions under Washington law, *see infra* note 7.

[3] Wash. Rev Code Ch 42 56.

and confidence in local government by increasing the transparency and accountability of the government and its legislative processes.

Petitioners seek to create a federal constitutional exemption to Washington's PRA, shielding ballot measure petitions from public view and citizen oversight. Although the integrity and transparency of Washington's state initiative and referendum process is most directly at issue under the facts of this case, a decision by this Court in favor of Petitioners would also significantly impact the ability of the City of Seattle and Washington's other local governments to keep both their representative and direct democracy legislative processes transparent. Given its interest in maintaining the transparency and accountability of its legislative processes, Seattle respectfully requests that this Court affirm the Ninth Circuit's decision and hold that the PRA's application to ballot measure petitions is constitutionally permissible.

From Seattle's perspective, this is a case about governmental transparency, not civil unions. Washington's Referendum 71 – the subject of the particular ballot measure petitions at issue in this case – addressed the issue of whether same-sex couples should be granted civil union rights under Washington law, but this lawsuit does not address that issue.[4] Rather,

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[4] Referendum 71 was approved by Washington's voters in November 2009 and will remain the law of Washington regardless of the outcome of this appeal.

this lawsuit is about the integrity, transparency, and openness of the ballot measure processes used by the State of Washington and its local governments. The PRA applies to ballot measure petitions regardless of the political leanings or convictions of a particular measure's supporters or of the individuals who sign its petitions.

II. Summary of Argument

In Washington, many local governments, including the City of Seattle, use or are subject to several different types of ballot measures, which require petitions signed by a certain number of registered voters to place an issue on a ballot. For local government ballot measure petitions, various local officials are responsible for verifying ballot measure petition signatures.

Washington's state and local governments are also subject to the Washington PRA. Under the PRA, state and local government documents – including ballot measure petitions submitted to state and local election authorities – are available to the public. Washington's expansive public disclosure laws promote accountability, citizen oversight, transparency, and open government. In the specific ballot measure petition context, Washington's public disclosure laws allow individuals to monitor state and local election authorities in their signature-verification role. By seeking to create a federal constitutional exemption from the PRA for ballot measure petitions, Petitioners

would limit Washington's ability to keep its government open and would severely limit the people's ability to monitor election officials' signature verification process.

Petitioners' efforts to treat ballot measure petitions as "pure speech" are also misplaced. On both the state and local levels, the primary purpose of ballot measure petitions is to trigger the legal mechanism that places initiatives, referenda, and other types of measures on a ballot. State and local governments regulate this process to ensure the integrity of the petitions and signatures. Treating ballot measure petitions as "pure speech" would call into question other laws regulating ballot measure petitions, including laws prohibiting multiple signatures from one signer, prohibiting signing with a false name or false address, and prohibiting signatures by nonvoters. Petitions that function primarily as speech should be treated differently than ballot measure petitions, and Washington's state and local governments should be permitted to regulate the ballot measure petition process.

Petitioners also attempt to define ballot measure petitions as anonymous speech even though ballot measure petitions require signers to use their actual names and addresses. To the extent that they are speech, ballot measure petitions are nonanonymous communications from individuals to government officials. By asking that their names be kept secret, Petitioners demand a level of protection senders of nonanonymous signed communications cannot reasonably

demand or expect from the recipients of their communications, particularly in light of the PRA. If nonanonymous signed ballot measure petitions must be kept anonymous notwithstanding the PRA, any other nonanonymous communication from a member of the public to a Washington state or local official could warrant anonymity as to the general public. As such, not only could a decision in favor of Petitioners subject the City of Seattle and Washington's other local governments to increased public records litigation regarding claims that signed communication should only be produced anonymously, Washington's public sector would become less transparent, and its people would be less informed about their governments' conduct.

III. Argument

A. Washington's state government, the City of Seattle, and Washington's other local governments maintain transparency in and facilitate public oversight of their ballot measure processes through Washington's broad public disclosure laws.

Although somewhat more limited than the broad initiative and referendum powers constitutionally reserved by the people for matters of Washington state law, local government jurisdictions in Washington may generally grant their citizens the rights of initiative

and referendum on subject matters within the local legislative power.[5] Seattle, like other Washington local governments that employ initiatives and referenda, sets its own signature requirements for these ballot measures.[6] In addition to city and county

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[5] *See Whatcom County v. Brisbane*, 884 P.2d 1326, 1328-29 (Wash. 1994) (citing Wash. Const. art. XI, § 4) (allowing home rule counties to adopt charters providing for initiatives and referenda); Wash. Rev. Code § 35.22.200 (allowing charter cities to "provide for direct legislation by the people through the initiative and referendum upon any matter within the scope of the powers, functions, or duties of the city"); *id.* § 35A.11.080 (allowing initiatives and referenda in noncharter code cities); Seattle City Charter art. IV, § 1(B) (adopting initiative power); *id.* art. IV, § 1(H) (adopting referendum power); King County, Wash., Charter art. II, § 230.40 (adopting referendum power); *id.* art. II, § 230.50 (adopting initiative power). Because local governments in Washington only have the authority delegated to them by state law, local initiative and referendum rights may not be used to address "power[ ] granted by the [state] legislature to the governing body of a [local government], rather than the [local government] itself." *City of Sequim v. Malkasian*, 138 P.3d 943, 948-50 (Wash. 2006) (citing *Leonard v. City of Bothell*, 557 P.2d 1306, 1310 (Wash. 1976)); *see also Brisbane*, 885 P.2d at 1328-29 (applying these rules to counties).

[6] *See* Seattle City Charter art. IV, § 1(B) (requiring signatures from "a number of registered voters equal to not less than ten (10) percent of the total number of votes cast for the office of Mayor at the last preceding municipal election" to trigger a Seattle initiative); *id.* art. IV, § 1(H) (requiring "a petition signed by a number of registered voters equal to not less than eight (8) percent of the total number of votes cast for the office of Mayor at the last preceding municipal election" to trigger a Seattle referendum); *see also id.* art. XX, § 2 (requiring a petition signed by "fifteen percent in number of the registered voters of the City voting at the last preceding election for the office of Mayor" for a voter-proposed Seattle City Charter amendment).

initiatives and referenda, Washington law provides for several other types of local government actions that require signature petition and voter approval procedures similar to initiatives and referenda, such as municipal annexation, change in forms of local government, creation of special local governmental districts, municipal charter amendments, and recall of elected officials.[7]

Washington's constitutionally-mandated state initiative and referendum rights "are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."[8] However, "the fundamental

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[7] *See, e.g.*, Wash. Rev. Code §§ 29A.56.110-270 (describing ballot measure petition and election process for recall of state and local elected officials); *id.* §§ 35.13.020-120 (describing ballot measure petition and election process for cities to annex unincorporated areas); *id.* § 35.22.120 (describing ballot measure petition and election process for municipal charter amendments); *id.* § 36.32.055(2) (describing ballot measure petition and election process for increasing size of boards of county commissioners in noncharter counties); *id.* § 36.69.020 (describing ballot measure petition and election process for forming park and recreation districts).

[8] *Sudduth v. Chapman*, 558 P.2d 806, 808-09 (Wash. 1977) (quoting *Rousso v. Meyers*, 390 P.2d 557 (Wash. 1964); *State ex rel. Howell v. Superior Court of Thurston County*, 166 P 1126 (Wash. 1917); *State ex rel. Case v Superior Court of Thurston County*, 143 P. 461 (Wash. 1914)).

requirement for a valid [ballot measure] petition is that it have the required number of signatures of legal voters."[9] To that end, in addition to ensuring that ballot measures have the required number of valid signatures, the proper purpose of state and local laws in Washington regulating ballot measure signature petitions is "to fairly guard against fraud and mistake" and "to protect the integrity of the initiative process."[10] For state initiatives and referenda – such as Referendum 71 – the Secretary of State is responsible for verifying petition signatures; for local government ballot measures, county auditors or elections directors are generally responsible for verifying petition signatures.[11]

"Washington's Public Records Act . . . gives the public access to the public records of state and local agencies, with the laudable goals of governmental transparency and accountability."[12] The PRA's stated purpose "is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the

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[9] *State ex rel. Evich v. Superior Court of Thurston County*, 61 P.2d 143, 147 (Wash. 1936).

[10] *Sudduth*, 558 P.2d at 808-09

[11] *See, e.g*, Wash. Rev. Code § 35.21.005(4) (addressing municipal ballot measure signature verification); *City of Seattle v. Yes for Seattle*, 93 P.3d 176, 177 (Wash Ct. App. 2004) (same); King County, Wash., Code § 1.16.100 (addressing King County ballot measure signature verification).

[12] *City of Federal Way v. Koenig*, 217 P.3d 1172, 1172 (Wash. 2009)

accountability to the people of public officials and institutions,"[13] and the act "is a strongly worded mandate for broad disclosure of public records."[14] The act itself explains that "[t]he people insist on remaining informed so that they may maintain control over the instruments that they have created."[15] The initiative that enacted the first version of the PRA proclaimed that "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society."[16] This is particularly true in Washington state, where "citizens have historically and consistently demanded transparent and open government to allow public oversight."[17]

Under the PRA, itself originally enacted by initiative in 1972, state and local agencies must "disclose all public records upon request, unless the record falls

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[13] *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 884 P.2d 592, 597 (Wash. 1994).

[14] *Spokane Research & Defense Fund v City of Spokane*, 117 P.3d 1117, 1123 (Wash. 2005) (quoting *Hearst Corp. v. Hoppe*, 580 P.2d 246, 249 (Wash. 1978))

[15] Wash. Rev. Code § 42.56.030

[16] Wash. Rev. Code § 42.17.010(11) (initially enacted as Initiative 276 in 1972 together with what is now codified separately as the PRA).

[17] *Northwest Gas Ass'n v. Washington Utilities & Transp. Com'n*, 168 P.3d 443, 456 (Wash. 2007) (citing *Progressive Animal Welfare Soc'y*, 884 P.2d at 597).

within a specific . . . statutory exemption."[18] The act defines a "public record" as "any writing containing information relating to the conduct of government . . . prepared, owned, used, or retained by any state or local agency. . . ."[19] State and local agencies bear the burden of establishing that an exemption applies to a particular public record shielding it from public disclosure, and exemptions to disclosure are narrowly construed.[20]

Ballot measure signature petitions are unambiguously public records under Washington's PRA – they plainly "contain[] information relating to the conduct of government," and, once submitted to the Secretary of State, a county auditor or elections director, or a city clerk, they are in the possession of a state or local agency.[21] Petitioners have not seriously challenged ballot measure signature petitions' status as public records, nor have they raised any PRA exemptions that would apply. As such, the only legal issue presented in this case is whether the First Amendment forecloses Washington state's right to implement and enforce its broad public disclosure

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[18] *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 189 P.3d 139, 144 (Wash. 2008) (footnote omitted)

[19] Wash. Rev. Code § 42.56.010(2).

[20] *See Progressive Animal Welfare Soc'y*, 884 P.2d at 251-52; Wash. Rev Code § 42.56.030.

[21] A ballot measure signature petition that has not been submitted or otherwise sent to a state or local government agency likely would not be a public record under the PRA.

laws and promote public sector transparency and accountability.

A decision by this Court holding that the First Amendment limits the PRA's application would harm Seattle's and other local governments' abilities to function openly and effectively and to earn and maintain the confidence of the people. As noted, a central purpose of Washington's broad public disclosure laws is to ensure that the people have the ability to monitor their governments. Public servants – federal, state, and local – can only govern effectively if they maintain the confidence of the people they serve, and, in turn, the people are more likely to maintain confidence in their governments if the people have the ability to monitor their governments.

Given the significant role ballot measures play in shaping the laws and structures of the State of Washington, the City of Seattle, and other Washington local governments, canvassing ballot measure petitions and verifying their signatures is one of the more closely monitored functions of government. Under the PRA, individuals can monitor and oversee the signature-verification process by requesting and obtaining copies of the petitions and other related documents. If Petitioners prevail in limiting the PRA's application, the public would lose this right and would be forced to rely – blindly and without any meaningful oversight powers – on the Secretary of State and county auditors and elections departments

to verify petition signatures.[22] Such limitations on public oversight and open government would harm the public, the City of Seattle, and Washington's other governmental entities, which depend on open government to build and maintain public trust and confidence.

B. Treating ballot measure petitions as pure political speech would prevent state and local governments from enforcing reasonable existing laws regulating petition signatures.

When a petition circulator asks an individual to sign a ballot measure petition, that is an act of speech. But when an individual actually signs a ballot measure petition for submission to the Secretary of State or a local government authority for the purpose of putting a measure on a ballot, that is a legislative act. These two acts are distinct from one

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[22] In the decision below, the Ninth Circuit observed that, absent the PRA, "[t]he oversight procedure provided by [Washington election law] allows the Secretary of State to limit observers to two opponents and two proponents of the referendum." *Doe v. Reed*, 586 F.3d 671, 679-80 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1133 (2010) (citing Wash. Rev. Code § 29A 72.230). The Ninth Circuit called "[t]his procedure . . . insufficient to shift oversight from the special interest groups to the general public" and determined that "[w]ithout the PRA, the public is effectively deprived of the opportunity independently to examine whether the State properly determined that a referendum qualified, or did not qualify, for the general election." *Id.* (citing *Progressive Animal Welfare Soc'y*, 884 P.2d at 597).

another, and they should be treated as such. Petitioners rely largely on this Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*,[23] which applies to petition circulators, not petition signers. This reliance is misplaced. Although Petitioners make the cursory assertion that "the discussant on one side of the clipboard in a protected 'discussion'" (the circulator) and "the discussant on the other side" (the signer) should be treated in the same manner,[24] an examination of their attempt to apply *Buckley* to petition signers illustrates the absurdity and the danger of this approach.

In *Buckley*, this Court struck down a Colorado law requiring that petition circulators be registered voters.[25] This Court reasoned that, for some, "the choice not to register [to vote] implicates political thought and expression," and determined that prohibiting these individuals from circulating ballot measure petitions impermissibly impeded their free speech rights.[26] *Buckley* also held that circulators had a constitutional right to not wear nametags (and therefore to remain anonymous) when circulating ballot measure petitions.[27]

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[23] 525 U.S. 182 (1999)

[24] Petitioners' Brief at 17.

[25] *See id.* at 195-97.

[26] *Id.* at 195-96.

[27] *See id.* at 197-200

If circulators and signers were truly the same as one another, virtually all of Washington's ballot measure petition laws could be void. Under current Washington law, it is a felony for a person to sign a ballot measure petition "with any other than his or her true name."[28] It is a gross misdemeanor to knowingly sign more than one petition for the same ballot measure, for someone who is not a legally registered voter to sign a petition, or for a signer to make a false statement as to his or her residence.[29] Were *Buckley* applied in a manner treating signers the same way it treats circulators, Washington and its local governments likely could not prohibit people from signing ballot measure petitions using pseudonyms or false addresses, nor could nonvoters be prohibited from signing ballot measure petitions.[30]

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[28] Wash. Rev. Code § 29A.84.230.

[29] *Id.* Seattle's and King County's ordinances addressing ballot measure signatures for city and county ballot measures also prohibit signatures "with any other than [the signer's] true name," "knowingly sign[ing] more than one (1) petition for the same initiative, referendum, or Charter amendment measure," or "sign[ing] any such petition knowing that [the signer] is not a registered voter of the City [of Seattle]." Seattle Mun. Code § 2.16.010(A)(4); *accord* King County, Wash., Code § 1.16.090. Violation of either of these provisions is a misdemeanor. Seattle Mun. Code § 2 16.020; King County, Wash., Code § 1.16.090.

[30] Washington's and Seattle's ballot measure petition regulations are both reasonable and limited. As explained, Washington courts have held that governments may only regulate the ballot measure process to the extent necessary "to fairly guard against fraud and mistake" and "to protect the integrity of the initiative process." *Sudduth*, 558 P.2d at 809. Indeed, Washington

(Continued on following page)

Petitioners have not explicitly advocated for this result, nor should they, because coming to terms with the full implications of equating circulators with signers would highlight the important distinctions they are trying to obscure.

The essence of this Court's holding in *Buckley* is that circulating a ballot measure petition is legally the same as any other type of speech – orally advocating on a street corner, holding a sign in a park, sending a letter to a state legislator, or publishing an online blog using a pseudonym. This Court has consistently held that everyone – regardless of voter registration status, voter eligibility, citizenship status, residency, engagement with mainstream politics, ideology, or wealth – has the right to speak both freely and anonymously, subject only to very limited and narrowly-tailored restrictions. Directly participating in the electoral process is another matter. States can and do regulate who may vote, and while the content of a voter's ballot is secret, the facts that a particular

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courts struck down statutes preventing the Secretary of State from counting any signatures by a voter who signed a petition more than once, holding that the Washington Constitution required the Secretary of State to count otherwise-valid signatures once even if there is a duplicate. *See id.* (striking down duplicate signature counting statute as to referendum petitions); *Pederson v. Moser*, 662 P.2d 866, 869 (Wash. 1983) (striking down duplicate signature counting statute as to recall petitions). Washington's and Seattle's current regulations fall within the narrower "fairly guard against fraud and mistake" and "protect the integrity" boundaries set by the Washington Supreme Court in *Sudduth* and *Pederson*.

voter is registered to vote or voted in a particular election are not. Individuals may advocate, argue, and attempt to persuade freely and anonymously, but the franchise is significantly more limited than free speech, and this Court has never recognized a right to anonymously register to vote or to keep secret the fact of casting a ballot.

What makes a ballot measure petition distinct from a traditional "pure speech" petition is the ballot measure petition's legislative role in placing a measure on a ballot. The purpose of speech is to articulate, spread, or convey a message. The purpose of a ballot measure petition is to trigger a legal mechanism provided for by Washington or local law to place initiatives, referenda, and certain other measures on ballots.[31] A signature on a ballot measure petition might function in part as a political statement, but its primary purpose is to meet the legal requirement for the number of signatures necessary to place an initiative or referendum upon a ballot. Unlike "pure speech," ballot measure petitions are closely regulated to ensure that the required number of legally registered voters sign petitions to place a measure on a ballot. State and local governments need to verify the accuracy and authenticity of ballot measure petition signatures to avoid fraud and ensure that only measures with the required number of valid signatures by registered voters are placed upon the

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[31] *See supra* note 6.

ballot. This type of regulation is neither necessary nor justifiable for "pure speech."

Individuals who want to express support for a ballot measure without subjecting themselves to the regulations that apply to official ballot measure petitions could, among other things, sign a petition stating their support for that ballot measure. Whether to speak or petition anonymously or openly on any petition other than a ballot measure petition is the speaker's choice. Such a "pure speech" petition could be identical in virtually every respect to an official ballot measure petition; the only difference is that it would not be submitted to the Secretary of State, county auditor, or city clerk to accomplish the legislative act of placing a measure upon a ballot.

Washington's laws regulating or otherwise affecting ballot measure petitions do not regulate the speech aspect of a ballot measure petition, they regulate the legislative aspect of the petition. The Washington Supreme Court has recognized and highlighted this distinction, holding that the distinguishing characteristic differentiating a ballot measure petition from a "pure speech" petition is the ballot measure petition's submission to the Secretary of State by the individual or organization sponsoring the ballot measure.[32] As such, it is not the character of

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[32] *See State v. Patric*, 389 P.2d 292, 294 (Wash. 1964) (reversing conviction for falsely signing an initiative petition when the petition was signed with a pseudonym but never submitted to the Secretary of State).

the petition or an individual's act of signing it that matters; the sponsor's submission of the petition to the Secretary of State is what gives the state an interest in ensuring the accuracy of the signatures, voter registration status, and residency of the signers.

Petitioners ask this Court to hold that the First Amendment trumps Washington's PRA and requires all ballot measure petitions to remain secret, shielded from public view and scrutiny. Such a holding would call into question all of Washington's other state and local regulations of ballot measure petitions. If, for example, a petition signer had a right to sign a petition, submit it to the Secretary of State or a county elections department, and keep his signature a secret despite unambiguous state statutory law making the petition a public record, Washington state and its local jurisdictions will have difficulty justifying their laws criminalizing petition signatures by nonvoters, intentional submission of multiple signatures from the same signer, pseudonymous signatures, and false addresses. Calling these laws into question would throw the ballot measure petition process into turmoil, damaging an important democratic and popular institution in Washington's state and local governments.

C. Creating a constitutional rule exempting ballot measure petitions from Washington's Public Records Act would weaken or destroy several other aspects of the act.

A ballot measure petition, like any other document "containing information relating to the conduct of government," only becomes a public record under the PRA when it comes into the possession of a state or local government agency.[33] Viewed in this light, a ballot measure petition is no different than any other communication from a member of the public to a government agency or official – if it "contain[s] information relating to the conduct of government" and is "prepared, owned, used, or retained by any state or local agency," it is a public record and must be disclosed absent a statutory exemption.[34]

Under this straightforward standard, requesters are entitled to a broad array of government documents, including correspondence between members of the public and government officials. For example, the City of Seattle treats citizen correspondence to city councilmembers or the mayor as public records to the extent such correspondence is related to the conduct of government.[35] If the correspondence was sent

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[33] *See* Wash. Rev. Code § 42 56.010(2).

[34] *See Bellevue John Does*, 189 P 3d at 144.

[35] Correspondence that only contains information related to a councilmember's election campaign or strictly personal matters is likely not a public record, *see, e.g., Tiberino v. Spokane*

(Continued on following page)

anonymously or pseudonymously, the sender remains anonymous or pseudonymous when the correspondence is produced; if the correspondence is sent using the sender's name, the correspondence is produced with the sender's name. In other words, whether the sender remains anonymous depends on whether he or she sent the correspondence anonymously.[36]

This framework also functions outside the public records or government contexts. For the most part, correspondence between two private, nongovernmental parties is only private to the extent the receiving party chooses to keep it private. A private party who receives correspondence may generally choose to broadcast it to the world or keep it confidential regardless of the wishes of the sender. To the extent they function as speech, ballot measure petitions are, in essence, nonanonymous correspondence from the signers to the government requesting that a particular action be taken (in this case, that Referendum 71 be placed upon Washington's November 2009 statewide ballot). Consequently, in asking this Court to

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County, 13 P.3d 1104, 1108 (Wash. Ct. App. 2000) (discussing threshold for "containing information relating to the conduct of government"), but correspondence regarding a proposed ordinance or another City of Seattle issue would generally be a public record.

[36] The PRA contains limited statutory exemptions to this rule. For example, applications for public employment are exempt from disclosure even though they are public records *See* Wash Rev. Code § 42.56 250(2). There is no assertion that any of these statutory exemptions apply in this case.

constitutionally prohibit the Secretary of State from producing the Referendum 71 ballot measure petitions, Petitioners are asking for significantly wider privacy protections than any other senders of non-anonymous communications would ordinarily receive in any other setting, private or public.

There is no basis for granting Petitioners these special protections – if Petitioners wanted to keep their correspondence to the government anonymous or pseudonymous, they could have sent it anonymously or pseudonymously. The advantage of petitioning or writing the government anonymously is that the speaker need not bear the burden of revealing his or her identity; the disadvantages of petitioning anonymously are that government officials are less likely to give significant weight to anonymous speech and that anonymous signatures cannot be used to place a measure upon a ballot. Any speaker can weigh these advantages and disadvantages before deciding whether to speak or petition anonymously or using his or her own name. But neither Petitioners nor anyone else should be granted the right to constitutionally circumvent public records laws by sending signed correspondence to the government while keeping it anonymous as to the general public.

Petitioners are asking this Court to push Washington's local governments down a slippery slope of ever-broadening unwritten exemptions to the PRA. If ballot measure petitions were constitutionally exempt from disclosure, future litigants will likely argue that, among other things, signed correspondence from

citizens to government officials should be withheld entirely or produced only with the sender's name redacted. Not only would this significantly narrow the scope of the PRA and cast a shadow over Washington's open government policies, it would subject the City of Seattle, along with Washington's other local governments, to significant litigation burdens as public agencies attempt to comply with the statutory scope of the PRA while anticipating a wide array of new, unwritten exemptions.

IV. Conclusion

The City of Seattle supports Washington state's long tradition of open government and strong public policies supporting broad public disclosure. These traditions, values, and policies keep the public informed and strengthen public trust and confidence in Washington's state and local governments. Seattle also supports limited, targeted regulation of the ballot measure petition process to ensure that measures only reach the ballot after obtaining the required number of valid signatures. Petitioners' arguments, if accepted by this Court, would generally make Washington's governments less open and would specifically limit the public's ability to monitor and remain informed regarding the process of determining whether a measure has qualified for the ballot.

Free speech, open government, and direct democracy are not mutually exclusive values. Petitioners

paint a misleading picture of these three values conflicting with one another; indeed, because accurate information about the conduct of government is often a key ingredient in free speech, a free press, and vibrant public discourse, the First Amendment's rights are diminished when governments become less open. Seattle respectfully requests that this Court recognize that these values are stronger when they work together by affirming the Ninth Circuit and allowing public disclosure of the Referendum 71 petitions.

Respectfully submitted,

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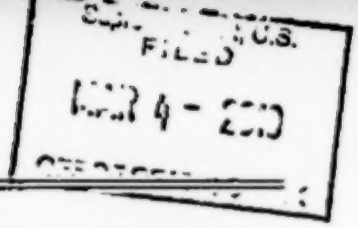
April 1, 2010

AMICUS CURIAE BRIEF

No. 09-559



In The
Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS, NATIONAL ORGANIZATION FOR MARRIAGE, FAMILY RESEARCH COUNCIL, AND AMERICAN VALUES IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS, NATIONAL ORGANIZATION FOR MARRIAGE, FAMILY RESEARCH COUNCIL, AND AMERICAN VALUES IN SUPPORT OF PETITIONERS

Committee for Truth in Politics, the National Organization for Marriage, the Family Research Council, and American Values submit this brief *Amici Curiae* and respectfully request that the Ninth Circuit's decision be reversed.

INTEREST OF *AMICI CURIAE*[1]

The Committee for Truth in Politics is an organization that is deeply concerned about associational privacy and the effect of compelled disclosure on the political process. Its interest is in defending against compelled disclosure of political associations.

The National Organization for Marriage is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. It was formed in response to the need for an organized opposition to same-sex marriage in state

[1] All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that this brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici*, its donors, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

legislatures and it serves as a national resource for marriage-related initiatives at the state and local level. It is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

Family Research Council, exempt from federal income tax under Internal Revenue Code § 501(c)(3), was founded as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Family Research Council also strives to ensure that the unique attributes of the family are recognized and respected through judicial decisions.

American Values is a non-profit organization whose vision is a nation that embraces life, marriage, family, faith and freedom, and it is deeply committed to defending traditional marriage and ensuring that the unalienable rights recognized by the Founding Fathers are upheld.

SUMMARY OF ARGUMENT

"Sunlight," that powerful disinfectant touted by Justice Brandeis, has become a panacea for any ill said to plague our democracy. Too much corruption in government? Enact stricter reporting requirements. Too many back-room deals? Enact earmark reform and lobbyist registration. Too many individuals and groups "hiding" behind misleading names on issue ads? Enact disclaimer requirements.

This case embodies what happens when sunlight reaches too far – when privacy rights are ignored – and disclosure of protected association and information is compelled for no other purpose than to silence those on the other side.

But openness, transparency and more information are not the only requirements to sustain a functioning vibrant democracy. The enjoyment of privacy of association, privacy of information, and the right to be let alone are also fundamental to our democracy. Technological advances continue to make our lives easier, but they also chip away at our privacy. We are subjected to scans and searches when we travel; we have to present identification to buy certain kinds of cough medicine; our vehicles are photographed going through intersections; our homes and businesses can be seen on the Internet at street view and even from above.

Yet despite this, citizens still value privacy and search for ways to maintain privacy and anonymity – for example, using cash; arranging transactions so that they remain under various reporting thresholds (e.g., campaign contributions; bank transactions); and using pre-paid cell phones. However, the only choice present in this case to maintain privacy lies in not exercising a fundamental right.

The state has conditioned the exercise of a fundamental right – a sovereign act to qualify referenda – on the relinquishment of privacy for information's sake. This information interest does not promote

openness, transparency or accountability of *government*. It does, however, focus the glare and heat of sunlight on ordinary citizens exercising their right to "vote" as citizen legislators. This compelled disclosure, coupled with technological advances, permits opponents to harass, intimidate and sanction these citizens. Consequently, the important associational privacy rights of these citizens should not be lightly dismissed.

ARGUMENT

This case illustrates the tension that exists between sunshine and associational privacy, both of which are required for a functioning democracy. *Cf. Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part) ("The public right to know ought not to be absolute when its exercise reveals private political convictions.").

Justice Brandeis advocated "sunlight as a disinfectant" because it illuminates and is the "best of disinfectants." Louis Brandeis, Harper's Weekly, Dec. 20, 1913, http://www.law.louisville.edu/library/collections/brandeis/node/196 (last visited March 2, 2010). In the marketplace of ideas, more information is usually better. But when associational rights such as those implicated by petition signing are involved, privacy trumps a mere informational interest.

The "freedom to engage in association for the advancement of beliefs and ideas" encompasses the

"protection of privacy of association." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); *see also DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966) ("'intrusion into the realm of political and associational privacy protected by the First Amendment.'" (*quoting Gibson*, 372 U.S. at 546)); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

Alexis de Tocqueville noted the importance of associations in our country. *See* Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966). "We constitute our selves in our associations with others, and our group affiliations are a crucial part of our identities." Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 178 (1996). When these associations "are exposed to the glare of unwanted publicity, great psychic, social, and economic harm may occur." Christopher Hunter, *Political Privacy and Online Politics: How E-Campaigning Threatens Voter Privacy*, http://131.193.153.231/www/issues/issue7_2/hunter/index.html (last visited February 15, 2010).

To protect our basic freedoms, the "law is also concerned with protecting sanctuaries of private liberty from state intervention." Seth F. Kreimer,

Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law, 140 U. PA. L. REV. 1, 7 (1991). The privacy afforded by these shadows are as necessary as the sunlight. *Id.* "The importance of that right to choose, both to the individual's self-development and to the exercise of responsible citizenship, makes the claim to privacy a fundamental part of civil liberty in democratic society." Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 JOURNAL OF SOCIAL ISSUES 431, 434 (2003). Without privacy, citizens cannot exercise basic freedoms. "If we are 'switched on' without our knowledge or consent, we have lost our fundamental constitutional rights to decide when and with whom we speak, publish, worship and associate." *Id.* The vitality of our democracy depends not only on the autonomy of its citizens – bolstered through privacy – but "on the concrete protection against public scrutiny of certain spheres of decision-making, including but not limited to the voting booth." Helen Nissenbaum, *Symposium: Technology, Values, and the Justice System: Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 150 (2004). It is the decisionmaking of the petition signers, which is akin to decisions made in the voting booth that is deserving of protection against public scrutiny.

I. Compelled Disclosure Of The Names And Addresses Of The Petition Signers Implicates Important Privacy And Associational Privacy Interests.

The Court has previously recognized the importance of political and associational privacy. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). "[T]he inviolability of privacy belonging to a citizen's political loyalties has [an] overwhelming importance to the well-being of our kind of society." *Sweezy*, 354 U.S. at 265 (Frankfurter, J., concurring in the result); *cf. Buckley*, 424 U.S. at 237 (Burger, J., dissenting) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society."). Technological advancements put these cornerstones of society at risk.

A. That which makes the Internet a stronger "disinfectant" also raises privacy interests.

Sunlight as a "disinfectant" was originally touted during a time when public records were accessible only by going to the depository, requesting specific documents, and then manually searching them for the desired information. Oftentimes, such searches involved great time and expense. The Internet has largely supplanted such searches, requiring only a wireless connection and a key search word or two.

Certainly, those who espoused the benefits of sunlight could not have foreseen the glare or heat of that same sunlight as amplified through technology.

One danger of the "disinfectant" is the accessibility it now provides. The prospect of only local limited access to public records has given way to "global broadcast." Nissenbaum, *Symposium, supra* at 122. The worries espoused by Samuel Warren and Louis Brandeis in the face of then-new developments in photographic and printing technologies are amplified hundredfold by Internet technology. *See id.*; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

1. Disclosing the petitions ensures that the petition signers' association no longer resides in "practical obscurity."

The federal government and the states have been collecting information related to associational privacy – voter registration, political party affiliation, contributions to candidates and other political organizations, frequency of voting – for decades, with most of it open to public inspection.

However, for the most part, these records of associations did not raise privacy concerns because they resided in "practical obscurity" due to the enormous effort necessary to locate and then search through them. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762

(1989); *see also* Peter Piazza, *How Public Should Public Records Be?*, SECURITY MGMT. (April 1, 2001) ("'[P]ractical obscurity' has long been a legal concept. It means that records made public . . . remain, for all practical purposes, obscure because they are difficult to access."). That is, they are so inaccessible in public archives that practically speaking, they remain private. *See* Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 Law and Philosophy 559-596 (1998), *available at* http://www.nyu.edu/projects/nissenbaum/papers/privacy.pdf at 16 (Noting that the time and effort needed to locate and search public records was costly and "created de facto protection, serving to limit access and, therefore, exposure.").

Consider, for example, an individual who wants to know whether his new employee has supported a referendum petition. Before the Internet and powerful search engines, records were localized, and someone looking for a public record had to determine its location (state, county, city), travel to the location of the depository (courthouse, state public records office), which could be located across the country, and make a request for the records. If the individual did not even know where in the United States the subject of the record resided, the search for information usually ended there. Even if the searcher knew that records regarding referendum petition signers were kept in a particular building in the state's capitol, if he lived a great distance from the capitol, that too might end the search.

Records were not located in searchable, indexed databases; depending on the size of the record, it might take large amounts of time to pore over each page. A searcher would have either needed to copy down the desired information, a very labor intensive task if a list of petition signers were involved, or hope that a copy machine was accessible and that he had enough change to make the necessary copies.

Contrast this labor-intensive, and often costly endeavor with the same search conducted today. There is "a vast difference between the public records that might be found after a diligent search of courthouse files, county archives . . . throughout the country and a computerized summary located in a single clearinghouse of information." *Reporter's Comm.*, 489 U.S. at 764. Records accessible on the Internet are no longer local; they can be found by anyone regardless of location.[2] The searcher does not need to know much about the particular record in question or where the desired public record is stored. Knowing only the name of the employee and general search terms (e.g., "John Doe," "Washington," "petition," "signatures"), the hypothetical employer in the above example can plug these terms into a search engine and is likely to turn up a sufficient amount of

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[2] Assuming arguendo the citizens of Washington state have an interest in knowing the identities of the petition signers, it does not follow, for example, that citizens of Florida have such an interest.

"hits" or leads.[3] These hits may be links to searchable databases or files, which can be printed, saved, uploaded, shared and aggregated. In just a few clicks of the mouse, the searcher can have his answer, with little time or resources expended and without leaving the comfort of his home or office.

Once relegated to a filing cabinet in a government office, often never to be seen again, associational information is now widely disseminated and further aggregated and supplemented by private entities and members of the news media. *See, e.g.*, Center for Responsive Politics, http://www.opensecrets.org (using a coding system to classify contributors' occupations); http://fundrace.huffingtonpost.com (website that measures political contributions, with color-coded maps and allows searches by name or address);[4] http://www.followthemoney.org (using phone directories and other research tools to determine economic or political identities of political contributors).

Signing a petition now requires "broadcasting my beliefs to anyone who has a modem." *Cf.* Fred Bernstein, Op-Ed, *An Online Peek at Your Politics,*

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[3] A searcher is not limited to locating the name of a specific individual who may have signed a petition; a general search may even turn up the entire list of petition signers.

[4] Upon discovering FundRace, "many people write in to have their information removed." Stefanie Olsen, *FundRace Shows Neighbors' Political Donations*, CNET News, http://news.cnet.com/2100-1028_3-5178135.html (last visited February 26, 2010). These requests are not honored. *Id.*

N.Y. TIMES, Oct. 4, 2000, at A35 (author commenting about mandatory disclosure of campaign contributions.). Ten years later, even that statement is outdated; private associations are now discoverable by anyone anywhere in the world with access to a wireless Internet device, for example, a cell phone.

2. Technology allows the petition signers to be forever associated with the petition, allows the association to be aggregated with other data, and thereby increases the potential for social stigma and sanctions.

"The law may remain the same, but its effect is entirely different." William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 12 (2003). Developments in technology have greatly impacted the privacy of association. Virtually unlimited amounts of information may be recorded, stored, aggregated, and shared permanently. The Internet can thus be used as the "spotlight of public opinion" to discourage unpopular associations. *Cf.* Seth Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 11 (1991).

Prior to the advent of the Internet, our associations remained private because searching for them was akin to a needle in a haystack search and rarely would anyone take the time to search. *See* Daniel J. Solove, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation:*

Access and Aggregation: Public Records, Privacy and the Constitution, 86 MINN. L. REV. 1137, 1178 (2002). A time-consuming and costly search might have made one intent on harm think twice. *Cf.* Kreimer, *supra* at 42 ("[G]overnment disclosure frees resources otherwise spent searching out targets for harassment."). Technology removed the deterrent imposed by the time and resources necessary to locate practically obscure associations and increases the potential for social stigma and sanctions. *Cf. Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information. . . .").

Not only does technology enable an individual intent on harassment and intimidation to locate associations quickly, without much effort, the search, sharing of results and spotlighting can be done anonymously. For example, the website www.eightmaps.com (whose creators remain unknown), provides an interactive Google map showing locations, names, addresses, donation amounts and, where provided, names of employers, of supporters of California's Proposition 8, which related to same-sex marriage. http://www.eightmaps.com; *see also* http://www.law.berkeley.edu/institutes/bclt/about/about_news_02-10-09_2.htm (last visited March 2, 2010). This information is often enough to enable someone to locate a home or e-mail address. *Id.* As a result, some supporters of Proposition 8 received death threats and/or had their businesses boycotted. *Id.*; *see also* Brad Stone, *Death*

Threats Follow Web Map of Donors, Int'l Herald Trib., Feb. 9, 2009 at 12. While Proposition 8 supporters are known, the identities of the creators of the website remain a mystery.[5]

Technological advances are rapidly being used in new ways to aggregate information and make new uses of it. Technology is capable of accumulating and storing information that may otherwise have been forgotten. The permanence of our associations, and their effects, cannot yet be measured. As one author remarked in 1991, "[w]e do not understand the scope of a disclosure into an electronic environment." Kreimer, *supra* at 115. Nineteen years later, we still don't fully know the ramifications of disclosure. There has yet to be a generation for which there has been the ability to record and store online all aspects of their lives from birth until death. *Cf.* http://cyber.law.harvard.edu/research/digitalnatives/areallyouthdigitalnatives (Digital natives, or the generation that was "born digital" are those individuals that were born 1982 or after.). Consequently, signers of petitions today have not lived long enough with technology to be able to fully grasp the consequences of their

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[5] Once these associations are disclosed by the state, they may be placed on the Internet for anyone in the world to see. *See* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1076 (1995) ("[T]here is no longer any viable tort remedy for injuries resulting from the dissemination of true information concerning an individual, no matter how private the information or how offensive the dissemination would be to a reasonable person.").

compelled association. *Cf.* Kreimer, *supra* at 115 ("Although today I may not care who knows about my ACLU membership, I may dearly wish in twenty years that it be confidential.").

Another danger of the "disinfectant" is its permanence, which removes any time limit on social stigma and harassment. *Cf.* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1042 (1995). The disclosed associations made by a signer today will be part of his or her identity today as well as twenty years from now because the permanence permitted by technology "allows the scrutiny to be extended indefinitely." *Id.* Compelled disclosure of associations, coupled with the technology of the Internet, removes any ability by the signers to remove, or make secret, that association from their past. "Once one has been identified as a member of the NAACP, she may be able to become a non-member, but she will always be an ex-member." Tien, *supra* at 178; *see also* Public Records on the Internet: The Privacy Dilemma, http://www.privacyrights.org/print/ar/onlinepubrecs.htm (last visited February 16, 2010) (The loss of "social forgiveness" is a consequence of the permanency of an electronic record.).

The passage of time, coupled with practical obscurity, no longer serve as protections against loss of privacy. *See Reporters Comm.*, 489 U.S. at 771 ("[I]n today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age

80. . . ."). "Nondisclosure is insurance against the future." Kreimer, *supra* at 115.

Not only will the hypothetical searcher, *see supra* at 6, have an answer to his question with a few clicks of the mouse, he will be able to add that information to other data available on the Internet. Information that was once scattered all over the country, with numerous institutions, may now be quickly gathered by "Googling" someone or purchasing information from an aggregator and then assembled into a permanent "digital biography" or dossier. The petition signer's association

> can be combined with information that is easily obtained by even the most casual Internet sleuth. An enormous wealth of data on an individual can be collected in a matter of minutes. Information drawn from public records often consists of fairly innocuous details, including one's height, weight, birth date, address, and telephone number. If one has access to special databases – and this access is fairly easy to get, in most instances – an interested party can ascertain a litigant's credit history, occupation, debt burden, and income. By "Googling" an individual's name, much more can often be learned, including educational background, civic involvement, and anything that has been deemed newsworthy by some editor at some point. This information creates . . . a "digital biography,". . . .

Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195, 200 (2004); *see also* Grayson Barber, *Article: Personal Information In Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 66 (2006) (describing the ease with which government records may be combined to create dossiers on citizens).

These digital biographies are used to make important decisions – whether to employ, whether to date, whether to entrust children in their care, whether to bombard with marketing. Digital biographies are also concerning from a privacy perspective because they may create an inaccurate picture of who someone is. (*See* Br. of Petitioners at 21) (some signers may merely intend to put the matter before the voters without expressing an opinion on the issue.). As such, the state should not add to the type of information available for compilation into digital biographies without demonstrating a compelling interest for the disclosure of protected association and private information.

B. Disclosing the petition signers' names and addresses to allow "personal" and "uncomfortable" conversations implicates the signers' privacy rights.

The state has asserted an interest in providing voters with information about who supports placing a

referendum on the ballot.[6] Two groups have publicly stated that they want to obtain copies of the petitions to encourage "personal" and "uncomfortable conversations." (Certiorari Petition Appendix 31a.) While attention has been given to the state's informational interest, and these groups' desire to confront, the court below gave little, if any, attention to the privacy rights of the petition signers.

Compelled public disclosure in this case involves revealing a political association, a fundamental liberty interest. *Cf. Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (recognizing that the Supreme Court has construed the right to informational privacy only when a fundamental liberty interest is implicated.). Compelling disclosure of the petition signers' names and addresses implicates the signers' interest in protecting against the disclosure of personal matters; interest in controlling his or her person and what information is shared; as well as a general right to be left alone.

The flip side of the state's "informational interest" is the petition signers' "informational privacy."

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[6] Other than mere curiosity or for purposes of harassment and intimidation, there is no compelling reason for a voter to know who signed the petitions. Once the petition signers affix their signatures to the petition – that is, vote – there is no need for "personal" and "uncomfortable conversations." *Cf.* Kreimer, *supra* at 134 ("A self-regarding act cannot be said to require publicity to allow others to protect their interests.").

"Information privacy" has been defined as one's ability to control the dissemination of personal information. McGeveran, *supra* at 14; *see also* Alan F. Westin, *Privacy and Freedom*, at 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); *see also Reporters Comm.*, 489 U.S. at 763 (noting that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."); *see* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 264 (2002) (footnotes omitted) ("Privacy . . . enables us to present to others only those parts of our selves that we want them to see. That in turn enables us to put forth different versions of our selves in different contexts. . . ."). Judge Posner has called this interest, "the face we present to the world." Richard A. Posner, *Overcoming Law*, at 531 (1995). This right to control information about oneself is under siege by technological advances which capture information about us in ways in which we may not even be aware.

Compelled disclosure is an intrusion into a sphere of personal liberty. McGeveran, *supra* at 19. An essential aspect of autonomy requires that individuals control the selective revelation, and the timing, of personal information to others. *Id.* Political associations label us, and compelled disclosure displays that label to others without our consent. *Id.*

Compelled disclosure removes the ability, to some extent, to have different relationships with different people. *See* Ferdinand Schoeman, *Privacy and Intimate Information,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 408 (Ferdinand David Schoeman ed. 1984). Freedom from scrutiny and zones of "relative insularity" are necessary conditions for formulating goals, values, conceptions of self, and principles of action because they provide venues in which people are free to experiment, act, and decide without giving account to others or being fearful of retribution. Nissenbaum, *Symposium*, *supra* at 148-149. Forcing citizens to publicly disclose associations they are constitutionally entitled to eschew is a violation of their constitutionally protected autonomy – their right to define themselves. *Cf.* Kreimer, *supra* at 69-70; *cf. also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 32-33 (1986) (Rehnquist, J., dissenting) ("an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in the freedom of conscience.").

"Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980). When addresses are disclosed by the state, privacy interests are implicated because the individual's home is no longer a safe refuge. Those

intent on confrontation, intimidation or harassment know where to go.

The right to privacy has been called "the right to be left alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) The home has long been a protected sphere. The state of Washington recognizes that a man's home is his castle and that he should be free from confrontation there. *Cf.* Wash. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). Disclosing the petition signers' names and addresses violate not only the privacy of the home, but the right to be left alone – free of any unwanted "personal" and "uncomfortable conversations."

C. The Government has a special obligation to protect citizens' privacy of assoition when they are forced to disclose associations and other private inforation.

As suggested by Warren and Brandeis:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all person, whatsoever . . . their position or station, from having matters which they may properly prefer

> to keep private, made public against their will.

Warren & Brandeis, *supra* at 214-15.

The state has a duty to withhold the petitions from disclosure because they contain compelled associations, but also because of the private information contained in the petitions. In *Whalen*, 429 U.S. at 591, the Court recognized a "privacy interest in keeping personal facts away from the public eye." *Reporters Comm.*, 489 U.S. at 770; *see also* McClurg, *supra* at 1067 ("[I]ndividuals should have some control over whether and to what extent they wish to surrender their privacy."). The *Whalen* Court also acknowledged that "the right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . In some circumstances that duty . . . has roots in the Constitution. . . ." 429 U.S. at 605.

This Court has recognized that citizens have a reasonable expectation of privacy with respect to their home and addresses:

> It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but in an organized society, there are few facts that are not at one time or another divulged to another. . . . An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information

> may be available to the public in some form. . . . We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.

U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 502 (1994).

Government should protect individuals who disclose information about themselves to the state *only* because they are forced to do so. Barber, *supra* at 63. Compelled disclosure of the information in the petitions, and subsequent publication on the Internet, can comprise safety.

Petition signers are required to provide their name and address. For some, disclosure of an address can be a matter of life or death.[7] For example, victims of domestic violence or stalkers, witnesses in a protection program, and law enforcement officers may not wish to disclose their address knowing that it will be published on the Internet for anyone to find. The government has a duty to protect the privacy of individuals who have taken steps to protect themselves, especially when the provision of an address is required to exercise a right akin to voting. *Cf. Whalen*, 429 U.S. at 607 (Brennan, J., concurring).

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[7] Consider, for example, the case of the murder of actress Rebecca Schaeffer, whose killer was able to locate her home address through Department of Motor Vehicles records. *See Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y. 2003).

For others, compelled disclosure of their association may create an appearance of bias, causing them to make the difficult choice between voting and avoiding an appearance of bias. For example, journalists often subscribe to a code of ethics that requires the avoidance of *public* political activity.

Judges are also deserving of protection from disclosure. The Model Code of Judicial Ethics allows *private* political activity, but signing a petition might be viewed as political activity. Model Code of Judicial Conduct Canon 5(A) cmt. 4 (the ban on public endorsements by judges "does not prohibit a judge . . . from privately expressing his or her views. . . ."). A judge might be required to recuse himself should a matter related to the petition come before him. *Cf.* 28 U.S.C. § 455(a) (calling for disqualification when a judge's "impartiality might reasonably be questioned."). Similarly, if a member of the armed forces signed a petition in favor of gay marriage, could his signature violate the "Don't Ask, Don't Tell" policy? These are but a few examples that highlight the important privacy interest that is implicated by the state's disclosure, and which is deserving of the state's protection.

The privacy of the petition signers' associational rights becomes even stronger when they are forced to choose between signing the petition and their privacy. An individual making a contribution to the referendum committee has a choice – assuming a high enough reporting threshold – the individual may maintain associational privacy as long as the contribution

amount is kept under the reporting threshold. A citizen that wants to associate with the referendum by signing the petition has no such choice.

II. The Privacy Interests At Stake Are Not Waived By Signing A Petition.

Individuals do not lose their associational privacy rights merely because not all aspects of the petition signing are private. *Reporters Comm.*, 489 U.S. at 770 ("[T]he fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'") (citation omitted); *cf. Sanders v. Am. Broad. Cos.*, 978 P.2d 67, 72 (Cal. 1999) (*quoting* 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5.10[A][2] (1998)) ("The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone."); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97 n.14 (1982) (although supporters of a political party are already public to some degree, "application of a disclosure requirement results in a dramatic increase in public exposure."). The privacy right lies in not revealing the association to those with whom he subjectively chooses not to share it. Andrew Lavoie, *Note: The Online Zoom Lens: Why Internet Street-level Mapping Technologies Demand Reconsideration of the Modern-day Tort Notion of "Public Privacy,"* 43 GA. L. REV. 575, 577 (2009).

Disclosure in one arena does not entail and is not equivalent to disclosure in others. Kreimer, *supra* at

112. An individual may choose to reveal associations to a limited group, but withhold such private information from the rest of the world. Therefore, the fact that the addresses of the petition signers may already appear in telephone directories or the fact that the other signatories on the petition sheet saw their names does not operate to waive the signers' associational privacy rights. *Cf.* Ferdinand Schoeman, *Gossip and Privacy*, in GOOD GOSSIP 72, 73 (Robert F. Goodman & Aaron Ben-Ze'ev eds., 1994) (Positing that revealing private information in one setting does not mean that "rights to civil inattention" are waived in another setting.). The Court should therefore protect the signers' associational privacy rights from compelled disclosure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-559

In The Supreme Court of the United States

JOHN DOE # 1, et al.,

Petitioners,

v.

SAM REED, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF COMMON SENSE FOR OREGON, THE OREGON ANTI-CRIME ALLIANCE, AND OREGONIANS IN ACTION IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF COMMON SENSE FOR OREGON, THE OREGON ANTI-CRIME ALLIANCE, AND OREGONIANS IN ACTION IN SUPPORT OF PETITIONERS[1]

Common Sense for Oregon, the Oregon Anti-Crime Alliance, and Oregonians in Action submit this brief *Amici Curiae* and respectfully request that the Ninth Circuit's decision be reversed.

INTERESTS OF THE *AMICI*

Common Sense for Oregon (CSFO) is a non-profit research, education, and advocacy organization dedicated to good government and protecting the initiative rights of the people of Oregon. As part of its mission, CSFO regularly authors, promotes, and circulates ballot measures in the state of Oregon. CSFO is currently circulating several ballot measures for the 2010 general election ballot, including one measure that will protect the privacy of petition signers and voters. *Oregon Initiative Petition 69 (2010)*, December 16, 2009, *available at:* http://www.sos.state.or.us/elections/irr/2010/069text.pdf (last visited February 17, 2010). In 2009, CSFO trained

[1] No party counsel authored any of this brief and no party, party counsel, or person other than CSFO, OAA, OIA, or their members paid for brief preparation and submission. The parties consented to the filing of this brief.

hundreds of volunteer petition circulators for a statewide tax referendum campaign that the public ultimately voted on in January of 2010. The initiative petition process is a significant and meaningful way that CSFO engages Oregonians in discussions about political change.

The **Oregon Anti-Crime Alliance** (OAA) is a non-profit research, education, and advocacy organization whose mission is to promote and support public policy that will help Oregon achieve a low crime rate. OAA's mission requires it to use the initiative process, when necessary, to implement sound public safety policy in the state of Oregon. OAA also engages in developing, authoring, and circulating ballot measures. In 2008, OAA successfully placed two statewide measures on the general election ballot. OAA currently plans to circulate several statewide ballot measures for the 2010 general election ballot. The initiative process is necessary for OAA to engage Oregonians in discussion about important public safety issues.

Oregonians in Action (OIA) is a non-profit education and advocacy organization dedicated to protecting property rights in Oregon. OIA regularly authors, promotes, and circulates ballot measures relating to property rights in the state of Oregon. The people of Oregon passed two OIA supported ballot measures over the last six years. Each measure garnered over 60% of the vote. Without the initiative process, it is unlikely that Oregon would have considered the policy concepts represented by OIA's

successful ballot measures. OIA relies on the initiative process to promulgate its ideas in Oregon's public square.

The initiative petition process is a critical tool each of these three non-profit organizations uses to present political ideas to the public. If the citizens of Oregon fear the growing threat of harassment, reprisals, or even identity theft resulting from the publication of petition signature sheets, the initiative process and the First Amendment rights of all Oregonians will be undermined. A fearful citizenry will not engage the petition circulator and Oregon's public discourse on good government, public safety, and property rights, as facilitated by the *Amici*, will decrease. If *Amici* can no longer successfully circulate petitions and obtain petition signatures from citizens, their ability to carry out their missions will be severely compromised.

SUMMARY OF ARGUMENT

This Court previously determined that petition circulation is highly protected core political speech, but this Court has not yet directly characterized *signing* a petition as core political speech. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999), *citing Meyer v. Grant*, 486 U.S. 414, 421 (1988). The court should use the opportunity presented by this case to find that signing an initiative, referendum, or recall petition is core political speech requiring the

highest protection offered by the First Amendment. *Amici* will not extensively brief this issue, because other *amici* and the parties will address the speech aspect of signing a petition. CSFO, OAA, and OIA nonetheless wish to begin by stating how important it is for this Court to recognize that signing a petition necessarily involves protected political speech.

The decision of the Ninth Circuit allows the state of Washington to apply its public records laws in a way that chills and burdens this core political speech. Harassment resulting from the public release of the names of petition signers has a chilling effect on the core political speech of potential petition signers as well as circulators. As discussed more fully in this brief, opponents of a petition use harassment – even the ***threat*** of harassment – as a tool to frustrate the circulation of a petition. The threat of petition signer harassment grows more potent with regular advancements in technology that improve the ability of initiative opponents to widely distribute the personal information contained on petition sheets.

Just as concerning, the state of Washington's position in this case misrepresents the political speech of petition signers. The state contends that signing a petition is equivalent to making a public declaration in support of the petition's subject. To the contrary, text from petitions themselves show that signing a petition is nothing more than a statement calling for a public vote on the measure at hand. Arguably, a signature on a petition also calls for a continuation of public dialogue on the subject, but

even this is not plain from petition statements in Washington and Oregon. The only statement one may make with certainty is that a petition signer wants the measure put to a vote of the people.

A citizen who calls for a public vote on a measure should not be subjected to harassment, facilitated by the government, on the erroneous basis that the citizen's signature on a petition is a public declaration of support or opposition on the subject of the measure. The specter of such harassment chills the political speech of petition signers and circulators. Recent events in Oregon, discussed below, dramatically underscore this point. Laws that facilitate such harassment chill core political speech and this Court cannot allow the situation to continue a moment longer.

ARGUMENT

I. SIGNING A PETITION COMMUNICATES IN WRITING A CITIZEN'S DESIRE TO SEE A MEASURE, RECALL, OR REFERENDUM PLACED ON THE BALLOT, AND NOTHING MORE.

The respondents and the Ninth Circuit acknowledge that signing a petition is political speech, yet both misunderstand the nature of signing a petition. While they correctly note that signing a petition is political speech, they mischaracterize this speech as public, quasi-legislative speech in favor of the

initiative. As a result, they fail to give this speech the protection of strict scrutiny analysis. The state of Washington has directly characterized signing a petition as a legislative act and public statement in favor of the subject of the petition. *Doe v. Reed*, ___ F.3d ___, 2009 WL 3401297 (9th Cir. 2009). The opinion below declines to go as far as the state of Washington; nonetheless, it describes signing a petition as an action with, "direct legislative effect," that goes far beyond "taking a stance" on a political issue. *Id.*

The state of Washington and the Ninth Circuit are fundamentally wrong about two particular points of the initiative process: what it means when a person signs a petition, and the circumstances in which persons tend to sign a petition.

One important point must be clear. Signing a petition in both Oregon and Washington ***does not*** mean the signer is expressing support for the subject matter of the petition. There can be no question on this point. Many citizens who believe in direct democracy as a principle in and of itself will sign a petition because they wish to see a public vote on the measure. This does not mean the signer ultimately plans to vote for the measure. *See* Comment of tmittelstaed to Brian Montopoli, *Should Signers of Anti-Gay Rights Petition Be Exposed*, November 3, 2009, *available at:* http://www.cbsnews.com/blogs/2009/11/03/politics/politicalhotsheet/entry5507399.shtml (last visited February 17, 2010); Comment of Commenter #14 to Jeff Soyer, *Should Petition Signers Be Granted*

Secrecy?, January 17, 2010, *available at:* http://www.alphecca.coml?p=2011 (last visited February 17, 2010); Comment of Commenter #706074, to Chris Grygiel, *U.S. Supreme Court could be next stop for R-71*, November 8, 2009, *available at:* http://www.seattlepi.com/local/411967_gayrights09.html (last visited February 17, 2010); and Comment of Commenter #786117, to Chris Grygiel, *U.S. Supreme Court could be next stop for R-71*, November 8, 2009, *available at:* http://www.seattlepi.com/local/411967_gayrights09.html (last visited February 17, 2010). In spite of this, and the plain language contained on petition sheets, the state of Washington and the opinion below incorrectly assume that signing a petition is a public statement of political belief. *Doe v. Reed*, ___ F.3d ___, 2009 WL 3401297 (9th Cir. 2009).

The Ninth Circuit also improperly characterizes petition circulation as an activity conducted only in public. *Doe v. Reed*, ___ F.3d ___, 2009 WL 3401297 (9th Cir. 2009). Modern circulation frequently makes use of more private forms of circulation, including electronic petitions and circulation by mail. *See* Common Sense for Oregon, *Circulating Measures 2010*, *available at:* http://commonsensefororegon.org/measures/2010-circulating-petitions/ (last visited February 17, 2010). These circulation methods do not take place in public. Americans increasingly communicate via the internet. Chief petitioners and ballot measure promulgators now use websites, Facebook, Twitter, and e-mail to circulate and communicate with the public. E-mail from Common Sense for Oregon to CSFO

Members Circulating Initiative Petition 50, February 5, 2010 (4:51 p.m.) (Appendix 1). *See also* http://www.twitter.com/CommonSenseOR, http://www.facebook.com/CommonSenseOR, http://www.twitter.com/OAA_Oregon, http://www.facebook.com/OAAOregon.

Modern circulators engage potential signers in the very private locations persons normally access this electronic information, such as their home, office, or personal mobile device. If states continue to disclose petition signer information via their public records laws, the states will effectively turn each petition signer's private home into a public square.

Language on petition sheets is clear that signers are only stating their desire for the Secretary of State to place the subject of the petition on the ballot for a vote of the people.

Both the state of Washington and the Ninth Circuit assume that signing a petition is an expression of support for the subject matter of a petition. The language from petition sheets used in Oregon and Washington show that signing a petition expresses nothing more than a citizen's desire for a measure to be put to a vote of the people. The actual signed statements contained on official petition sheets for Referendum 71 case do not declare support or opposition to the measure. The same is true of petition sheets in Oregon. A citizen signing a petition

in these states is sending a written request to an elections official asking that the measure be put to a vote of the people, nothing more, and nothing less.

The Referendum 71 declaration signed by the petition signers reads, "We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. 71, filed to revoke a bill that would expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses, except that a domestic partnership is not a marriage, and was passed by the 61st legislature of the State of Washington at the last regular session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." *Doe v. Reed*, ___ F.3d ___, 2009 WL 3401297 (9th Cir. 2009). This language, even read without care, does not make a statement in support of repealing the domestic partnership law. It only says that the signer wants the people of Washington to vote on Referendum 71.

Oregon petitions contain similar language. Initiative Petition 50 (2010) states, "To the Secretary of State of Oregon, I request this measure to be

submitted to the people of Oregon for their approval or rejection at the election to be held on November 2, 2010. A full and correct copy of this measure was made available for review and I have not previously signed a petition sheet for this measure." Common Sense for Oregon, *Initiative Petition 50 (2010) E-Petition, available at:* http://commonsensefororegon.org/pdf/50ESIG_Code_A.pdf (last visited February 17, 2010). In fact, because of this Oregon petition sheet language, CSFO specifically trains circulators to tell signers to sign the petition if they want a measure put to a vote of the people. Circulators are discouraged from telling potential signers anything that suggests signing a petition enacts the measure. Only the vote of the people at the ballot box can make an initiative petition operative Oregon law. Likewise, those who signed the petition to place Referendum 71 on the ballot did not cast a vote for or make a public statement in support of repealing Washington's domestic partnership law when they signed the Referendum 71 petition. Rather, they only signed a statement requesting that Referendum 71 be put to a vote of the people.

In this case, supporters of Referendum 71 want access to the petition sheets in order to publicize the names of the citizens who signed the petition to refer Referendum 71. The supporters of Referendum 71 are prepared to mischaracterize the nature of a person's signature on Referendum 71 as expressing opposition to the "everything but marriage" law. Undoubtedly, Referendum 71's supporters are hoping

signers of the referendum petition will "feel the heat" and not sign such a petition again. Classic schoolyard bullying, to be sure.

The statements from Oregon and Washington petitions, which are what the citizens actually sign, are clearly not statements of public support for an initiative to the extent asserted by the opinion below. One may only state with certainty that the petition signers want the measure placed on the ballot for a vote of the people. One might reasonably guess that the signature on a petition shows the signer's wish to see the people of the state engage in a larger public dialogue about the merits of the petition. One may not divine from a signature on a petition that the signer ultimately supports or opposes the measure; nothing in the language of the petition sheets supports such a claim.

To sum the dispute, the Washington Public Records law, as the state of Washington would like to apply it, will facilitate this misrepresentation. It will be like the principal giving a schoolyard bully the names of all the students with wealthy parents (these students, presumably, would have the most lunch money). Although the students listed by the principal may have wealthy parents, that does not mean the students have the most lunch money or even carry lunch money at all. All giving the schoolyard bully the names of the wealthiest parents will do is facilitate

harassment on the playground. How can this ever be acceptable?

The Court will probably balance Washington's public records law and the First Amendment to determine the outcome of this case. As this brief will demonstrate, allowing groups aligned against a petition to use a public records law to harass petition signers burdens and chills core political speech. The burdens created by a state's public disclosure of petition signer information are anything but incidental. In a growing number of cases, fear of disclosure functions as a censor that prevents signers and circulators from speaking. A burden that silences speech is severe, and the First Amendment, not a public records law, should prevail.

II. THE OREGON EXPERIENCE SHOWS THAT PETITION SIGNERS AND CIRCULATORS EXPERIENCE HARASSMENT, AND THIS HARASSMENT IS A SERIOUS CHILL TO THEIR FREEDOM OF POLITICAL SPEECH.

Oregon has a rich one-hundred year history of direct democracy. In 1902, the people of Oregon approved an amendment to their constitution reserving some legislative powers to the people. Or. Const. Article IV, Sec. I. The direct democracy rights of Oregonians are generous by American standards, including the right of citizen initiated statutes, constitutional amendments, recalls, and referrals. *Id.* Sadly, petition signers and circulators in Oregon also

have a history of experiencing harassment as a result of participating in these cherished democratic activities.

Petition sheets are public records in Oregon. Any party willing to pay for a public records request can obtain access to petition sheets and the personal information the sheets contain. As technology expands to make the dissemination of information remarkably simple, incidences of petition signer harassment and intimidation are on the increase in Oregon and elsewhere. Harassment enabled by a public records law that discloses petition sheets causes Oregonians to refuse to circulate, sign, and turn in petitions. For example, a blogger involved in a campaign to recall Portland Mayor Sam Adams recently posted on-line that citizens are scared they will be targeted for reprisals by the Mayor's supporters if they sign a recall petition. Comment of tmittelstaed to Brian Montopoli, *Should Signers of Anti-Gay Rights Petition Be Exposed?*, November 3, 2009, *available at:* http://www.cbsnews.com/blogs/2009/11/03/politics/politicalhotsheet/entry5507399.shtml (last visited February 17, 2010).

Similarly, a chief petitioner in another Oregon case chose not to turn in over 1,500 signatures for a local recall on the basis that the signers of the petition might experience the same frightening threats she herself was subject to as the public face of the recall. In 2004, hundreds of petition signers and circulators for Ralph Nader's presidential campaign in Oregon received letters the campaign considered to be

intimidation and harassment. Letter from Teresa Amato to Margaret Olney, August 13, 2004 (Appendix 9). These letters threatened criminal investigations and made sweeping allegations of forgery and fraud which were later proved unfounded. E-mail from Linda Williams to Travis Diskin, February 11, 2010 (8:38 a.m.)(Appendix 7). Thirty of Nader's circulators declined to circulate petitions after experiencing this harassment. Brad Cain, *Nader Faithful, Democrats Spar in Oregon*, Eugene Register-Guard, August 19, 2004, *available at:* http://news.google.com/newspapers?nid=1310&dat=20040819&id=AVoUAAAAIBAJ&sjid=kOsDAAAAIBAJ&pg=6589,4179516 (last visited February 17, 2010). These incidents, and others, caused Common Sense for Oregon to circulate an initiative petition for the 2010 general election that will prohibit elections officials from releasing signed petition sheets or their contents to the public. *Oregon Initiative Petition 69 (2010)*, December 16, 2009, *available at:* http://www.sos.state.or.us/elections/irr/2010/069text.pdf (last visited February 17, 2010).

The fear of harassment facilitated by the perverse use of public records laws is not merely a chill on the political speech of potential signers. It also burdens the political speech of petition circulators. Circulating a petition is political speech this Court considers worthy of the highest levels of First Amendment protection. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999), *citing Meyer v. Grant*, 486 U.S. 414, 421 (1988). A circulator attempting to engage in interactive communication about a measure is cut short when citizens decline to

engage for fear of harassment resulting from the public release of signer information. Fearful citizens will not speak to a circulator in person or read emails or visit websites to learn more about measures for the purpose of signing a petition. A state law that creates in potential signers a legitimate fear of harassment and reprisal thus burdens a circulator's ability to engage in core political speech. Just as onerous regulations of petition circulators decrease the pool of circulators available to promote a measure, the threat of harassment and reprisals resulting from the publication of the petition signer information reduces the pool of citizens willing to sign an initiative petition.

A. 2010 West Linn Recall Petition Signer and Circulator Harassment

Mary Ann Mattecheck is an elderly widow concerned about the management of her city, West Linn, Oregon. Mrs. Mattecheck recently organized a recall petition campaign to recall three West Linn city councilors. The campaign became very controversial in her small town. Elizabeth Hovde, *Worried about retaliation, campaign backer keeps signatures to herself*, The Oregonian, February 8, 2010, *available at:* http://www.oregonlive.com/hovde/index.ssf/2010/02/worried_about_retaliation_camp.html (last visited February 17, 2010). Mrs. Mattecheck's efforts were publicly opposed by many involved in government, including the local police union and apparently the Speaker of the Oregon House of Representatives, whose campaign committee donated funds to a group opposed to the recall.

Citizens of West Linn were afraid to sign the petitions from the beginning, fearing reprisals to themselves and their businesses. E-mail from Anonymous Citizen to Patti Galle, February 2, 2010 (10:49 p.m.)(Appendix 4); Declaration of Sarah Hunt Vasche (Appendix 3). The recall campaign started out gathering signatures in public places, but stopped, because many potential signers did not want to sign in public in their small town. *Id.* The campaign quickly switched its focus to door to door circulation. Signers were more comfortable signing the controversial recall petition in the privacy of their homes. This approach was also needed because local businesses feared reprisals from recall opponents if they allowed gatherers to collect signatures on public sidewalks near their businesses.

As the campaign became heated, several supporters of the recall contacted Mrs. Mattecheck to request that their signatures be blacked out of the recall petitions. These signers had not changed their mind about the recall, rather, they feared harassment and other reprisals if recall petition signer information became public. For obvious reasons, the concerns of petition signers and circulators escalated after the local police union issued a blistering written statement in opposition of the recall. Letter from Clackamas County Peace Officer's Association, January 14, 2010 (Appendix 6). West Linn is a small town of 24,000 people, so anyone in the city is easily within a 10 minute drive of any location in town. Were the names and addresses of all the petition signers released to the public, opponents of the recall could

easily find the signers and harass them at their home or place of business.

Mrs. Mattecheck received dozens of threatening phone calls, most after 10 p.m. in the evening. These phone calls included hang-ups, persons screaming obscenities and vulgarities, and direct threats against Mrs. Mattecheck's safety such as, "You'd better watch your back." Declaration of Sarah Hunt Vasche, February 16, 2010 (Appendix 3). To an elderly woman with a disability, this harassment is alarming. Mrs. Mattecheck is compelled by these threats to take substantial steps for her personal protection. Steps she has taken include limiting the amount of time she spends in public in West Linn, to the point of driving to the next town over to shop for groceries, keeping a video camera installed on her front porch, and carrying a cell phone whenever she leaves her home. As an elderly widow in her 70's, Mrs. Mattecheck considers these measures quite extreme.

All Mrs. Mattecheck did was exercise her First Amendment rights. Now, in the United States of America, civic-minded widow Mary Ann Mattecheck must fear for her own safety because she dared to circulate a recall petition. It is beyond comprehension that anyone possibly thinks allowing government facilitation of this harassment – through a public records law or otherwise – is constitutionally permissible.

To make matters worse, the threats and personal intimidation suffered by Mrs. Mattecheck forced her to take another extreme measure. Rather than risk

the physical, emotional, and economic health of her supporters, Mrs. Mattecheck ultimately chose not to file the signatures that may have qualified the recall to ballot. Mrs. Mattecheck, as the public face of the movement, did not want to subject neighbors who signed her petition to the same harassment she received from recall opponents. Letter from Mary Ann Mattecheck to West Linn Recall Campaign Supporters, January 28, 2010 (Appendix 5).

Fear of harassment and reprisals resulting from the release of recall petition signer information burdened Mrs. Mattecheck's freedom of speech in several ways. This fear caused her fellow citizens to decline to engage with her in public places about the recall. This fear of reprisals caused some citizens of West Linn, Oregon, to refuse to sign the recall petition even though they personally supported the recall. E-mail from Anonymous Citizen to Patti Galle, February 2, 2010 (10:49 p.m.)(Appendix 4). The potential public availability of petition signer information was a freezing chill on the political speech of these otherwise would-be petition signers. This chill ultimately froze Mrs. Mattecheck's political speech because she chose not to file her petitions in order to protect the signers.

The West Linn case shows that the possibility the government will publish petition signer information is something far more than a slight burden on political speech. The public release of one's personal information on a petition sheet is a serious impediment to initiative-related speech in the age of modern

technology. Any opponent of an initiative measure, armed with the information on petition sheets, can easily locate a signer, send them mail, appear at their home, perform an internet search to discern their place of business and phone number, and more. A truly unscrupulous opponent can even use the names and addresses to steal petition signer identities for the sole purpose of personal destruction. The burden posed by public release of signer information is particularly acute when hardy citizens use the initiative process to take on entrenched political interests, as was the case in West Linn.

B. 2004 Ralph Nader Campaign Petition Signer and Circulator Harassment

In 2004, Oregon citizens who signed or circulated petitions to place Ralph Nader's presidential candidacy on the Oregon ballot experienced what they considered harassment due to the public availability of the petition signer and circulator information. A well organized group of opponents who sought to keep Nader off Oregon's ballot in 2004 aggressively contacted hundreds of Nader petition signers and circulators through the mail or in person at their residences. E-mail from Linda Williams to Travis Diskin, February 11, 2010 (8:39 a.m.)(Appendix 7).

At least sixty petition circulators for the Nader campaign were sent a letter stating that Nader circulators were potentially subject to criminal investigation for fraud and forgery. Letter from Margaret Olney to Nader Petition Circulator, August 12, 2004

(Appendix 8). To a lay-person circulator, the letter is very suggestive that the individual circulator receiving the letter is presently under investigation. The Nader campaign alleged this letter was designed to intimidate supporters and keep them from circulating Nader petitions. Letter from Teresa Amato to Margaret Olney, August 13, 2004 (Appendix 9). At least one Nader circulator was visited at home, at night and threatened by hostile persons opposed to Nader's candidacy. Brad Cain, *Nader Faithful, Democrats Spar in Oregon, Eugene Register-Guard*, August 19, 2004, *available at:* http://news.google.com/newspapers?nid=1310&dat=20040819&id=AVoUAAAAIBAJ&sjid=kOsDAAAAIBAJ&pg=6589,4179516 (last visited February 17, 2010).

Over the years, Oregon petition signers have received letters from opponents of measures alleging that circulators in Oregon engage in numerous acts of fraud and forgery. Many Nader petition signers received this sort of letter in 2004. E-mail from Linda Williams to Travis Diskin, February 11, 2010 (8:39 a.m.)(Appendix 7). These letters urge citizens to report to the sender whether or not their signature was forged on the petition. An example of this kind of letter, though not from the Nader campaign specifically, shows just how willing initiative opponents are to contact signers in hopes of frustrating petition circulation. Letter from the Voter Education Project to JoAnne Werner, June 2002 (Appendix 10). Many petition signers are confused or misled by these letters, which, if not read carefully, may lead a petition signer to believe they are the victim of a massive forgery operation. An Oregon attorney involved in the

Nader campaign reports that all investigations instigated by this type of letter sent to Nader petition signers were dismissed for lack of evidence. E-mail from Linda Williams to Travis Diskin, February 11, 2010 (8:39 a.m.)(Appendix 7). Many investigations were closed because the voter alleging forgery at the behest of Nader foes recanted. *Id.*

Each letter individually may seem insignificant, but it is important to consider that *hundreds* of Oregonians received these letters as a result of signing a petition or circulating a petition. These letters created a large amount of fear among legitimate petition signers and circulators for the Nader campaign. Brad Cain, *Nader Faithful, Democrats Spar in Oregon,* Eugene Register-Guard, August 19, 2004, *available at:* http://news.google.com/newspapers?nid=1310&dat=20040819&id=AVoUAAAAIBAJ&sjid=kOsDAAAAIBAJ&pg=6589,4179516 (last visited February 17, 2010).

Even if one does not consider this situation to rise to the level of serious intimidation, the scenario demonstrates how easy it is for a group who obtains public record copies of petition sheets to find and approach signers and circulators through the mail and at their homes. Further, these actions of harassment chilled the political speech of thirty Nader campaign circulators, who refused to circulate after receiving these letters or home visits from persons opposing Nader's candidacy. *Id.*

C. Public release of petition sheets results in harassment elsewhere

Harassment of petition signers and circulators is not unique to Oregon. Supporters of traditional marriage, in particular, have seen their personal information, including their home address, published in searchable databases on the internet for the express purpose of reprisals. The harassment and threats experienced by these citizen petition signers is well documented by other briefs recently before this Court, particularly the Brief of *Amicus Curiae* Alliance Defense Fund in Support of Petitioner, *Citizens United v. FEC*, No. 08-205 (U.S. 2009).

D. State laws that facilitate harassment of petition signers burden the political speech of petition circulators because potential signers afraid of harassment will not engage the circulator.

The act of petition circulation is political speech this Court grants the highest order of First Amendment protection. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186 (1999), *citing Meyer v. Grant*, 486 U.S. 414, 421 (1988). Public disclosure of petition signer information is a genuine and significant burden on the ability of circulators to engage in political conversations about their measures. Just ask Mary Ann Mattecheck. When citizens will not sign petitions for fear of publication it becomes less likely the circulator will be able to speak to the citizen about petitions. Public disclosure of petition signer

information, in other words, shrinks the pool of persons willing to engage a circulator in conversations about signing petitions. This Court should disallow any application of a public records law that imposes such burden on the protected speech of petition circulators.

III. MODERN PETITION SIGNING INCREASINGLY OCCURS IN PRIVATE.

In addition to its faulty assumption about the nature of signing a petition, the Ninth Circuit determines, incorrectly, that petition circulation is "public" because petition circulation occurs in public. *Doe v. Reed*, ___ F.3d ___, 2009 WL 3401297 (9th Cir. 2009). This flawed assumption led the Ninth Circuit to conclude that petition signatures are already "public" prior to disclosure by the state, and therefore the names of those who sign a petition are already public knowledge regardless of whether or not the state releases the petitions. The Ninth Circuit extends this reasoning to conclude that allowing the state of Washington's public records law to trump the First Amendment amounts to "no harm, no foul."

The Ninth Circuit decision, however, ignores the advancements in petition circulation technology over the last few years. Petition circulation has evolved beyond circulators gathering signatures on public sidewalks. Many chief petitioners circulate by new alternative means that are more secure and less costly. Modern technology allows chief petitioners to circulate e-petitions on websites, via e-mail, and at

e-kiosks. Chief petitioners will also mail petitions to potential signers based on database lists of interested registered voters. While chief petitioners certainly continue to gather signatures by circulating in public places, signing a petition is increasingly an act done in private.

E-Circulation

Petitions are now easily circulated via electronic mail, website, and electronic kiosk. Common Sense for Oregon (CSFO) circulates online and e-petition signature sheets that accommodate only one signature. Common Sense for Oregon, *Initiative Petition 50 (2010) E-Petition, available at:* http://commonsensefor oregon.org/pdf/50ESIG_Code_A.pdf (last visited February 17, 2010)(Appendix 1). The Oregon Anti-Crime Alliance and Oregonians In Action also intend to utilize this technology in the future.

E-Petitions allow potential signers to download this petition from the chief petitioner's website, along with explanatory information about the petition. Persons who download and sign e-petitions usually print and sign the petition in the privacy of their home or office. A person who downloads and signs a petition that accommodates only their signature is not exposing their opinion to numerous strangers, nor would they necessarily anticipate that signing the petition is a public declaration of support.

Common Sense for Oregon also circulates petitions by E-Petition kiosk. Photograph of E-Petition

Kiosk (Appendix 2). The E-Petition kiosk, approved by Oregon's Secretary of State, allows potential signers to view a measure and print single signature petition sheets at a kiosk location. Kiosks are generally located in public places, but they allow a potential signer to print a petition sheet to sign at their own leisure. Kiosk petitions, like other E-Petitions, are single signature in Oregon, so the signer of a kiosk E-Petition has not exposed his personal information to other members of the general public or even a live signature gatherer.

Mail Circulation

It is common for chief petitioners to mail out petition sheets to volunteers and potentially interested citizens. Mail circulation usually results in the chief petitioner receiving petition sheets signed by members of only one family or household. During Oregon's recent Measure 66 & 67 tax referendum campaign, for example, the chief petitioners received numerous petitions containing only the signatures of spouses or members of one household. Signing a petition in the presence of a member of one's family unit is hardly a public act.

Publicly Signed Petition Sheets

Petition circulators who circulate in public places will attest that it is common to see entire family units or groups of friends sign a petition sheet at once. Most persons go out to public places accompanied by

friends or family members. In Oregon, because petition sheets now generally contain no more than ten signature lines, only two or three groups of friends or family will usually sign a single petition sheet. While it is possible that up to nine "strangers" plus the circulator will see a person's signature on an Oregon signature sheet, the practical reality is several of the "strangers" who supposedly have access to a signer's information are already friends or family members of the signer. Another practical reality is that most persons who sign in public are in a hurry to get on with their personal business. Signers quickly sign the petition and move on. Any circulator will attest that it is rare, even odd, to have a signer stop to examine the names and information of other persons who signed the petition.

CONCLUSION

Signing a petition is a private act in support of placing a subject to a vote of the people. The application of the Washington public records law at issue in this case twists private political speech into a public political statement of support for a measure, recall, or referendum. The threat of disclosure is a chill on the protected political speech of petition signers, and a burden on the political speech of the petition circulator. *Amici Curiae* Common Sense for Oregon, the Oregon Anti-Crime Alliance, and

Oregonians In Action respectfully request this Court reverse the decision below.

Respectfully submitted,

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February 23, 2010

Appendix 1

Sarah

From: Common Sense For Oregon [noreply@commonsensefororegon.org]
Sent: Friday, February 05, 2010 4:51 PM
To: sarahv@mannixlawfirm.com
Subject: Help Change Oregon! Official Oregon E-petition: Independent Redistricting Commission Amendment

If you are having trouble viewing this message, please click here.

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Better Government. Better Results. Stronger Oregon.

Common Sense For Oregon was founded with a mission to serve the people of Oregon by making it a better place to raise a family. By protecting Oregon's 100 year old Initiative System and Initiative System and Referendum Process, Common Sense For Oregon is an advocate for the voice of the people. Writing and supporting ballot measures, allows Common Sense to be on the front lines of the battle for Oregon's future. Be a part of that future by signing a petition today.

Common Sense For Oregon Presents:

Independent Redistricting Commission Amendment

The links below are for the Independent Redistricting Commission Amendment. The first link is for the initiative petition, the second link is for the text of the measure.

Independent Redistricting Commission Amendment E-petition Form

Text of Independent Redistricting Commission Amendment

Go to: Summary

E-Mail Updates

Yes, please periodically send me e-mail updates.*

Click Here

* By subscribing to my e-mail updates, you are authorizing me to send regular e-mail updates from my office to your e-mail account.

Please Feel Free to Tell a Friend

E-mail:
[ ]
E-mail:
[ ]
E-mail:

Summary:

Redistricting – or reapportionment – is the process of re-drawing the lines for legislative districts. Redistricting occurs every ten years in Oregon, and is supposed to allow legislative district boundaries to be redrawn in order to account for changes in a state's population.

Redistricting is supposed to be a non-partisan process, and is supposed to ensure that districts are drawn as fairly as possible.

In Oregon, legislative districts are currently drawn by legislators themselves, which creates an obvious conflict of interest. Instead of drawing legislative districts fairly, politicians draw districts to guarantee their re-election, and the election of their fellow party members. A process that is supposed to be fair and non-partisan is now controlled by self-interested partisan politicians who ignore the basic tenets of fairness in order to enhance their own political power.

The Independent Redistricting Commission Amendment eliminates the conflict of interest and self-dealing by politicians by creating a non-partisan commission of retired judges – appointed by the chief justice of the Oregon Supreme Court – who are responsible for drawing the boundaries for Oregon's legislative districts. By having judges – and not politicians – draw the lines, the Independent Redistricting Commission Amendment eliminates the conflict of interest that exists in the current system, and guarantees a fair process for all Oregonians.

It is time to eliminate the politicians' conflict of interest. It is time to adopt the Independent Redistricting Commission Amendment.

Instructions:

In this newsletter are two links for the petition for the Independent Redistricting Commission Amendment. There are some things you need to know before you send in your petition:

1. Only the person who actually prints the petition sheet can sign the petition sheet. In other words, you cannot print off multiple copies of this petition for your friends and family. Each person that signs one of these E-Petitions must physically press "PRINT" on the computer and sign the petition he/she printed;

2. Be sure to fill in all the information at the bottom of the page. However – DO NOT FILL IN THE SPACE ENTITLED "SHEET NUMBER"; THAT IS FOR OFFICE USE ONLY;

3. The petition is a "self mailer". That is, the postage is already pre-paid. All you have to do is sign the petition, fill out the information, fold the petition and mail it in. We have to pay for each piece that is mailed, so if you are feeling generous, feel free to attach a stamp to the outside of the petition as well;

4. The petition sheet will print so that you can fold the petition into thirds in order to mail the petition. After folding the petition, please us A PIECE OF

TAPE to secure the petition – PLEASE DO NOT USE STAPLES;

5. Feel free to email this E-Newsletter to your own EMAIL lists and ask you friends and family to sign this petition and bring real change to Oregon!

Thank you again for all your support. Please keep an eye out in the very near future for additional E-Newsletters with additional petitions for you to support.

2007 State Street
Salem, Oregon 97301

BEST AVAILABLE COPY

Appendix 3

DECLARATION

I, Sarah E. Hunt Vasche, make the following declaration:

1. I am an attorney at law licensed to practice law in the state of Oregon. I am attorney at the law offices of Kevin L. Mannix, P.C. in Marion County, Oregon. I have personal knowledge of the facts set forth in this declaration, and if called as a witness, I can and would testify competently thereto.

2. I personally interviewed the chief petitioner of the West Linn recall effort, Ms. Mary Ann Mattecheck.

5. Ms. Mattecheck told me that she received over two dozen harassing or threatening phone calls at her residence as a result of her participation in the recall. The majority of these calls occurred late in the evening, after 10 p.m. These calls contained vulgar obscenities and threats against Ms. Mattecheck's person, including statements such as, "You had better watch your back." Ms. Mattecheck also reported being approached in public places by hostile persons opposed to the recall.

5. Ms. Mattecheck informed me she is afraid for her personal safety because of this harassment. She has a video camera installed at her front door. She will not open the front door unless she can see that the person at the door is well-known to her. Ms. Mattecheck says she no longer feels safe in her community. She drives

out of town to do her grocery shopping. She did not want the signers of the recall petition to experience similar harassment and fear, so she withheld the signatures from filing. The final straw for Ms. Mattecheck was the vocal opposition of the local police union. She did not want petition signers to be targeted by the police.

6. Ms. Mattecheck gathered signatures door-to-door because some signers did not want to sign the petition in public places for fear of retaliation. Ms. Mattecheck stated that more than one citizen refused to sign the recall petition for fear of retaliation. Local business owners were afraid to have recall supporters gather signatures on public sidewalks near their businesses for fear of retaliation based on the appearance of support for the recall effort.

I declare under penalty of perjury that the foregoing is true and correct

Executed this 16th day of February, 2010.

/s/ Sarah E. Hunt Vasche
Sarah E. Hunt Vasche

Appendix 4

– On **Mon, 2/1/10,** [redacted] < [redacted] > wrote:

From: [redacted]>
Subject: **Re: Intimidation Stops Recall**
To: mail@pattigalle.com
Date: **Monday, February 1, 2010, 10:49 PM**

HI Patti:

This email and attachments made my head spin and though I forwarded to my [redacted] for discussion I am still collecting my thoughts. First, I can say that I personally felt it would be unwise for me to sign because I felt sure the word would get out. (Hey, one call to Parks department about salmon in streams and I'm in a memo . . .) So add me to the ranks of those that felt some concern for repercussions. I had made up my mind to do so over Scott since I feel there is no possibility of reaching him, but I never "ran into" anyone collecting signatures so my (false) impression was that this effort wasn't getting off the ground. With regard to John Kovash based on a few personal conversations and Jody Carson who seems to becoming more approachable I did not want my signature on a (likely to fail) recall petition to make it any harder to work toward cooperation on case by case issues.

Second, I particularly like the attached "message" from Mary Ann Mattecheck. I find it thoughtful and well written. I agree with her decision. The press release included in the email may be a bit off-target in that it reads more like a letter (which might get published if submitted that way) but I am not sure it

will trigger reporters dig into the story – though it might. I was surprised that the list of intimidation did not include Lynn Fox' NA attack, but perhaps including that would likely defocus the message. Of course they will have to present quotes/perspectives from both sides. If they energy were focused on a few reporters contacted personally it might go farther. That's press strategy for international electronics trade press (where I know something) – which may or may not have any bearing on our local coverage. Are there really 154 print, tv and radio journalists locally? – wow. I'll be looking for coverage.

Lastly, the missing pieces document looks like a good work in process, but still needs a cogent short form. I still can't make a fact-based, cogent argument about how cooperating on sewers leads to build out of Stafford in the time available to chat with parents a school or sports event. (I think that is a reasonable test for a message.) May be its because there are several "stories" in that document that each need to be told separately.

That's it for now. Thanks for your response to my draft letter.

Sorry I had to miss meeting [redacted]. I like the raised hands graphic you sent.

All the best, [redacted]

[redacted]

Appendix 5

An Important Message from
Mary Ann Mattecheck

Dear Friends and Neighbors of West Linn,

> *First and foremost, I would like to say we have had a wonderful time meeting with you these past few months, exchanging our experiences and insights into West Linn City government.*

Our group of concerned West Linn citizens has steadily and quietly gone door-to-door gathering signatures. On numerous occasions you have even called us to your homes and we have listened to your many concerns. We have heard the concerns of many residents; presented our fact based information and researched your questions for follow-up on our Recall Website. www.westlinnrecall.com

We gathered signatures in a dignified transparent process that respected all West Linn residents and the cherished rights and process of our democracy. We have been pleased and surprised by your warm reception and candor and discovered a great deal about West Linn and its residents. We made a number of observations along the way; here are a few I'd like to share with you.

We discovered residents of West Linn are bright, hard working, trusting people. Unfortunately, they are often too caught up in the daily challenge of keeping hearth and home together, to stay abreast of the workings of city government which has left us, for far

too long, vulnerable and exploited by bad governance and poor representation.

We found West Linn is a reflection of the national political fabric, with its own brand of ideologues, demagogues, and its own homegrown version of misinformation, half-truths and hearsay. It is not surprising considering the need to retain control; our recall committee has been targeted by a strident and raucous group of anti-recall crusaders.

Fear of the truth, and transparency of government, can be the only explanation that would bring out such rage infused personal threats directed at me and those merely exercising their constitutional rights. I understand the Anti-Recall force's frustration and anger with their failure to originally identity the author of the West Linn Recall. Originally, their anger and fury seemed to be directed at the mayor and for this I apologize for their misguided accusations.

Anti Recall pundits rarely offer substantive solutions only platitudes like "Greater Good" and "Must Have a Seat at the Table"; all the while, councilors Burgess, Carson and Kovash and the Anti-Recall Committee are quite satisfied with whatever is ladled out by the forces of *big* Government and Special Interests, that know "what is best".

More recently, as "West Linn Working Together" has learned of our success in gathering signatures for the recall they have increased their malicious attacks. The intended atmosphere of fear was further cultivated by the recent pledge of support by the Clackamas County

Police Officers Association to the three councilors Carson, Burgess, Kovash, and WLWT; it's subtle, but the timing of their announcement makes it difficult to dismiss their letter of support as anything other than veiled intimidation.

I have learned of growing apprehension and fear by individuals whose livelihoods depend on good relations with the community at large. If you are a realtor, a shopkeeper, an insurance broker, have children in school, or in any way engage the public you must take serious such oblique intimidation. In my life time I've seen my share of this type of veiled intimidation and I certainly take it seriously.

My friends and supporters have worked silently behind the scenes to help me and I in turn have guaranteed anonymity. Sadly, I have realized that upon filing our petition anonymity will be compromised; every name and address on the petition will be scrutinized, and as part of the public record, available to spiteful factions. After sleepless nights, numerous vicious attacking phone calls, and childish personal attacks, I am simply not willing to risk the welfares of the families, businesses and reputations of those citizens that have so graciously come to my support.

I must advise that despite exceeding the minimum threshold of petition signatures, I as Chief Petitioner will *not* file our Recall petition. To do so could subject others to potential abuses I willingly accept. However, I can no longer in good conscience submit your names and addresses to a hostile city hall.

This experience has made me even stronger in my belief that a single citizen can stand up and try to make a change when government does not listen to its citizens. I am much more comfortable with a truly secret ballot. Please refer to the fact sheet attached and/or our web site, share the information with your neighbors and ask who was served, Special Interest or the Public Good?

I look forward to joining you in November; the fight to take our city back has just begun;

Mary Ann Mattecheck

Appendix 6

[Logo]

CLACKAMAS COUNTY
PEACE OFFICER'S ASSOCIATION

REPRESENTING
Clackamas County Sheriff's Office
Clackamas County Medical Examiners
District Attorney's Office Investigators
Molalla Police Department
West Linn Police Department

P.O. Box 427 • Oregon City, OR 97045 •
(503) 655-4070 • Fax (503)650-4070

January 14, 2010

The Clackamas County Peace Officer's Association in accordance with the Officers of the West Linn Police Department, want to express our support for West Linn City Councilors Burgess, Carson, and Kovash, and we are in strong opposition to the recall effort currently underway for these three elected officials.

The members of the Clackamas County Peace Officer's Association understand that there are times when we must make difficult decisions regarding political activity in West Linn. Those decisions are not made lightly, and we make those decisions with the best interests of the majority of the citizens that the City represents.

It is apparent to the West Linn members of the Clackamas County Peace Officers Association that there is a small contingent of citizens within the City

of West Linn that is behind this recall effort. We believe some of these citizens may be expressing inaccurate and misleading facts. We closely follow our council meetings and are appalled at the lack of professionalism exhibited by some of these citizens that allege they have West Linn's best interest at heart.

In these economic times we need sound leaders that demonstrate professionalism, high ethical standards, and are willing to put the City of West Linn ahead of personal agendas.

We encourage you to join the members of The Clackamas County Peace Officer's Association, who have your best interests and safety as our number one priority. Support Councilor Burgess, Councilor Carson, and Councilor Kovash, and do not support this damaging recall effort.

West Linn Association Members
Clackamas County Peace Officer's Association

Jim Doolittle

/s/ Jim Doolittle
Shop Steward
Clackamas County Peace
Officer's Association

Appendix 7

Sarah

From: Travis Diskin [travisdiskin@gmail.com]
Sent: Thursday, February 11, 2010 10:16 AM
To: Sarah Hunt Vasche
Subject: Fwd: Nader case – Signer Harassment
Attachments: VEP_Letr_2002.pdf; Lowe_2004.pdf

– Forwarded message –

From: **Linda Williams** <linda@lindawilliams.net>
Date: Thu, Feb 11, 2010 at 8:39 AM
Subject: Re: Nader case – Signer Harassment
To: Travis Diskin <travisdiskin@gmail.com>

Attached are sample letter and complaint by VEP (2002) and sample of type of complaint filed by Olney in 2004 – there are literally hundreds more pages in the files, each reflecting some kind of contact with the signer. I can't find the signer letter complaining about the "visit" in 2004 – it was not all that relevant to defamation claim, so it's somewhere – perhaps Greg kept a file of Nader stuff.

These particular examples may not mean much in isolation. They have to be seen in the context of a pattern of political dirty tricks – every complaint was dismissed for insufficient evidence. Hundreds of voters were contacted with letters and calls from VEP and thousands of $$ spent on forensics and investigations from AG (I have some of those docs) all so union-backed "project"e to claim that opponent's campaign was "under investigation," based on misleading or harrassing folks who had signed petition sheets.

Linda K. Williams
Attorney

320 S.W. Stark St # 202
Portland, OR 97204
503-2647

10266 S.W. Lancaster Rd
Portland, OR 97219
503-293-0399

linda@lindawilliams.net
503-245-2772 fax

Travis Diskin wrote:

Would it be possible to get Sarah the info below that she is asking for?

Thanks

I would like to see her information, if possible. At least a copy of the letter from VEP to the signers and circulators. The copy of the complaint against Olney's folks would also be useful.

Sarah

On Tue, Feb 9, 2010 at 2:28 PM,
Linda Williams <linda@lindawilliams.net> wrote:

As part of the defamation claim (Ryan Stephenson), I reviewed many election law complaints (ELC) at Elections Office. I have partial records from all of the ELC filed by Berg/Wentz as Voter Education Project in 2002 and all of the Nader Complaints filed by Ellen Lowe in 2004. I say "partial" because there were 100s and 100s of pages of alleged forged petition sheets in the VEP complaints and I did not make

copies of all of them. (I went and reviewed all the files personally and ran the copies myself for free at Elections office to avoid the 25 cent/pg charge by them if they did the copies). I think there were about 40 different "files" – really haphazard collections of paper in most cases, and there was no reason to copy all the "evidence" VEP submitted at that time.

I did this in early Jan and don't recall specifically what's in those copies, but I'm pretty sure there is least 1 ELCt from a person who was "visited" or received the threatening letters from Margaret Olney in 2004. (Dismissed, since it didn't fit the intimidation definition which does not include hassling signers after the fact).

The VEP files show that VEP sent 100s of letters to voters asking them if they had actually signed a petition because the AG was investigating "fraud" and sometimes some person would respond and say "no," at which point VEP would add that scribbled response as "evidence" of forgery and send in more copies of petition sheets to SoS.. All the fraud allegations by VEP were dismissed. In almost every case, the voter either recanted (told investigator they were not really sure if they signed or not), or the crack forensic lab said the signature was authentic. In one case, the voter's husband said it was her signature (as did the lab) but she insisted in wasn't. If the WA attys want any copies, its fine with me, and you can forward this summary of what I have to them.

* * *

Appendix 8

[redacted]

SMITH
DIAMOND
& OLNEY
ATTORNEYS AT LAW

Barbara J. Diamond
Margaret S. Olney*
Monica A. Smith
*Member Oregon
and Washington Bars

August 12, 2004

[redacted]
Portland, OR 97209

Re: Signature gathering for Nader campaign

Dear [redacted]:

This law firm is currently investigating concerns about a large number of invalid voter signatures on nominating petitions filed with Multnomah County in support of Ralph Nader for President. We are looking into whether fraudulent signature-gathering techniques were used in the circulation of those petitions.

We are writing to you because your name appears as the circulator on a number of the nominating petitions. Based on information that we have received, we are reviewing the petitions that you signed as circulator. If you are willing to talk to us about the petitions that you circulated, or have any information that you would like to bring to our attention, please call me at the number listed below.

In the meantime, we would like to remind you that your signature certifies that you personally witnessed each signature collected on the petition and that you obtained the signatures from qualified voters. Falsely signing the petition may result in conviction of a felony with a fine of up to $100,000 or prison for up to five years.

Sincerely,

SMITH, DIAMOND & OLNEY

/s/ Margaret S. Olney
Margaret S. Olney

MSO/sap

Appendix 9

[redacted]

Nader
FOR PRESIDENT 2004

VIA FACSIMILE: [redacted]

August 13, 2004

Margaret S. Olney
Smith Diamond & Olney
1500 NE Irving
Suite 370
Portland, OR 97232

Dear Ms. Olney:

The attached copy of your letter, dated August 12, 2004, which you have been circulating to the Nader for President 2004 nominating petition circulators in Oregon, constitutes a blatant attempt to intimidate campaign workers, to disrupt and interfere with the Nader campaign, and may constitute a violation of Oregon Statutes (*See e.g.* O.R.S. §260.575) and Federal election law. We demand that you immediately cease and desist all such practices.

By copy of this letter to John Lindback, Director of the Elections Division of the Oregon Secretary of State, the Nader for President 2004 campaign lodges a complaint against you and these practices, and asks that the Elections Division, likewise, demand that you cease and desist.

Sincerely,

/s/ Theresa Amato
Theresa Amato
National Campaign Manager

Attachment

cc: Mr. John Lindback
Director Elections Division
Oregon Secretary of State
Fax: 503-373-7414

P.O. Box 18002 • Washington, DC 20036 •
Tel: 202 265 4000 • Fax: 202 265 0092 • voteNader.org

Paid for by Nader for President 2004

Appendix 10

THINK BEFORE YOU INK

VOTER EDUCATION PROJECT

Phone: 1.800.295.5597
FAX: 503.239.8588
www.votereducationproject.org

JoAnn Werner
3888 Meadow Lawn Lp SE
Salem, Oregon 97301

RE: Signature fraud research – Initiative petition #18

Dear Sir or Madam:

The Voter Education Project is a non-profit watchdog organization that focuses on ballot initiative fraud. The Oregon Attorney General recently prosecuted two signature gatherers, who were convicted of forging signatures. Similar complaints have been filed against several others for forgery, fraud and misrepresentation. These complaints are now under investigation by the Attorney General's office.

We are concerned about the scope of these problems and are contacting people whose signatures appear on the initiative petitions recently submitted to the Oregon Secretary of State.

Enclosed you will find a copy of a petition sheet for initiative #18 that contains your signature. Please use the form below to confirm that this is your valid signature and promptly return this letter to us. We have enclosed a postage-paid return envelope for your convenience.

We appreciate your assistance with this matter. The Oregon initiative system is a cherished aspect of our democracy and deserves to be protected.

If you questions please call us at the Voter Education Project at 1-800-295-5597

Very truly yours,

/s/ Jeannie Berg
Jeannie Berg
Project Director

☐ **No.** This is not my signature

☑ **Yes.** This is [looks like] my signature. [I don't remember signing this. That is *not* my print.]

☐ **No.** I was not informed of the content of this petition prior to signing it. ***Note:*** *The subject is in bold, above the signature lines on the petition.*

☐ **Yes.** I was informed of the content of this petition prior to signing it. ***Note:*** *The subject is in bold, above the signature lines on the petition.*

/s/ JoAnn Werner _____ 6-18-02
Date

Phone Number 503-540-7676

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 3 - 2010
OFFICE OF THE CLERK

No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

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March 4, 2010

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www.knowthyneighbor.org 16

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INTEREST OF AMICUS CURIAE[1]

Concerned Women for America (CWA) is a non-profit, tax-exempt corporation organized to protect and promote Biblical values among all citizens – first through prayer, then education, and finally by influencing our society – thereby reversing the decline in moral values in our nation. The vision of CWA is for women and like-minded men, from all walks of life, to come together and restore the family to its traditional purpose and thereby allow each member of the family to realize their God-given potential and be more responsible citizens.

CWA's Washington state group collected signatures for the Referendum-71 petition which is the subject of this appeal. CWA believes those signatories had a reasonable expectation that their personal information would not be disclosed for any other purpose than to verify the statutory requirements for signing a petition. Additionally, CWA seeks to protect those signatories from having their support of Referendum 71, their personal information, and the address of their family's home globally publicized and made available to individuals and groups with a history of harassment and intimidation against those opposed to the homosexual viewpoint. CWA believes that its public policy perspective will provide a useful

---

[1] No party counsel authored any of this brief and no party, party counsel, or person other than counsel for amicus curiae Concerned Women for America paid for brief preparation and submission The parties consented to the filing of this brief.

additional viewpoint to this Honorable Court on relevant matters not already brought to its attention by the parties.

SUMMARY OF ARGUMENT

The state of Washington historically has protected the public trust by adhering to a policy of treating the signing of a referendum petition equivalent to voting and granting these two forms of political speech identical Constitutional protections – until the issue of the Referendum 71 ("R-71") petition arose. The history of corruption and voter intimidation that led to the implementation of the secret ballot in our nation illustrates the need for anonymity for voters who sign referendum petitions today. The voters who signed the R-71 petition have the right to privacy in their signatures and personal identifying information placed on the petition. Signing the R-71 petition was substantially the same core political speech as casting a vote on the ultimate issue, and therefore the signatures, home addresses, and all other personal identifying information on the petition should be treated with the confidentiality of a secret ballot.

ARGUMENT

I. Signing The Referendum 71 Petition Equivalent To Casting A Vote

This Court is being called to consider whether voters who signed a referendum petition may be compelled against their will to have personal identifying information about themselves, their association, and their political opinions disclosed to the public at large. The importance of anonymity in signing a petition is best exemplified by its political counterpart – voting. Washington has had a long-standing public policy which regards voting and signing petitions as equivalent, and it is important that this Court consider the similarities and relationship between voting and signing a petition, and the history and reasons our nation implemented the secret ballot procedure in elections. The rationale that led to the use of secret ballots in our elections is the same argument that favors anonymity for voters who sign petitions today.

A. Voting And Signing Petitions Have The Same Prerequisites Of Law And Criminal Penalties For Violations

The action, or political speech, involved in signing the R-71 petition is substantially the same as casting a vote by secret ballot. The prerequisites of law for voting and signing a referendum petition are equivalent. To vote in the state of Washington one must be a legally qualified and registered voter. RCW

29A.08.010; RCW 29A.84.660. There are criminal penalties for registering to vote if not a qualified voter, for making a false statement regarding your residence on a voter registration form, for voting if not a registered voter and for voting more than once. RCW 29A.84.130; RCW 29A.84.660; RCW 29A.84.650. It is a crime to threaten or bribe a voter to vote for or against any person or ballot measure, or to use "menace, force, threat, or any unlawful means towards any voter to hinder or deter such a voter from voting . . . " RCW 29A.84.620. Each of these voting offenses is a class C felony punishable under RCW 9A.20.021. *Id.*; RCW 29A.84.130; RCW 29A.84.660; RCW 29A.84.650.

Similarly, to sponsor or sign a referendum petition in the state of Washington one must be a legally qualified and registered voter. RCW 29A.72.010; RCW 29A.84.230. There are criminal penalties for signing a petition if not a legal voter, for signing a petition with another name, for making a false statement regarding your residence on an initiative or referendum petition, or for signing a petition for the same initiative or referendum more than once.[2] RCW 29A.84.230. It is a crime to:

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[2] The R-71 petition had a warning printed in bold in a box at the top of the petition stating, "WARNING: Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or

(Continued on following page)

> "Interfere with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum petition or with the right to *vote* for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice;"

RCW 29A.84.250 (emphasis added). Note that the Washington legislature treats interfering with a voter signing a petition and interfering with a voter's right to vote for or against a referendum equally in the eyes of the law. *Id.* Each of these crimes is a gross misdemeanor punishable under RCW 9A.20.021. *Id.* If the law treats the actions, or political speech, of signing a petition and voting with the same protection from criminal interference, then it logically follows that they should be treated with equal confidentiality by the law as well.

B. Washington Public Policy Has Treated Voting And Signing Petitions Equally

Public officials in the state of Washington have long held the position that signing petitions and casting a secret ballot are equivalent and deserve the same strict protection from publication. G.W. Hamilton, Washington's Attorney General in 1938, explained the public policy of the state this way:

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imprisonment or both." *See* Joint Appendix to Petitioners' Brief pp. 31-32.

> "[i]t is the public policy of this state that we uphold the secret ballot in every particular and *these petitions are, more or less, in effect a vote of those who sign the petitions* requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied."

Wash. Op. Att'y Gen. 378 (1938) (emphasis added).[3] Even after Washington's current Public Records Act was enacted, the Secretary of State of Washington, A. Ludlow Kramer, issued an Official Statement that held:

> "It has been my policy not to release the names of citizens signing initiative or referendum petitions. As far as I am concerned petitions are not public records and are being held in trust by this office. I consider *the signing of an initiative or referendum petition a form of voting by the people.* Furthermore, the release of these signatures have no legal

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[3] *See also* Washington Attorney General Opinion stating that after the secretary of state has counted the signatures on an initiative petition and found it to be sufficient, the bound volumes of such signatures are not public records and should not be available for public inspection. "In our opinion to regard such signatures as public records would be contrary to public policy" Wash. Op. Att'y Gen. 55-57 No. 274 (1956).

> value, but could have deep political ramifications to those signing. I will not violate the public trust."

A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (emphasis added).

C. Interpretation Of Signing Petitions As Secret Ballots

Federal Courts as well as state courts, when considering the issue of whether a petition should be treated as a secret ballot, have concluded the privacy interests equivalent. The Eighth Circuit Court of Appeals recently determined that petitions have the same privacy interest as secret ballots:

> . . . those signing the petition all declared their position on the ultimate issue: "We support a voluntary checkoff program." In so doing, petitioners all unequivocally declared that they would vote to end the mandatory program and thus return to the voluntary program. *To make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners' privacy interest in a secret ballot.*

Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187 (8th Cir. 2000); *See also Daily Gazette Company v. Bailey*, 152 W. Va. 521, 528, 164 S.E.2d 414, 418 (1968), and *The Shepherdstown Observer v. Maghan*, No. 09-c-169 (Jefferson County, W. Va. 2009) (noting "many signers of the certificates indicated that they would not have signed had they believed

their names would be published."). The Washington Constitution provides that "[a]ll elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector *absolute secrecy* in preparing and depositing his ballot." Wash. Const. Art. VI, § 6 (emphasis added). The United Nations has proclaimed that the secret ballot is a fundamental human right. United Nations Universal Declaration of Human Rights, Art. 21.[4] "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." *Id.* Such world-wide recognition that tyranny and oppression results from violating a voter's right to privacy and confidentiality in political expression clearly holds true for both the secret ballot and voters who sign petitions. Having petitions published globally on the internet and votes cast in elections kept by secret ballot would violate the UN's proclamation for "equivalent free voting procedures." *Id.*

Even the language on referendum petitions indicate to the voter that signing a petition is declaring a position, i.e. voting, on the ultimate issue decided in a

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[4] The United Nations Universal Declaration of Human Rights, adopted on December 10, 1948 by the UN General Assembly, is available at www.un.org.

later election.[5] The R-71 petition contained the words "Ballot Measure Summary" and "Ballot Title" at the top of the petition. *See* Joint Appendix to Petitioners' Brief pp. 31-32. Based upon the language of petitions, and the long legal precedent and public policy of the state of Washington, the individuals who signed the petition reasonably had confidence that their signatures and private information, including the location of their homes where they and their children reside, would not be disclosed by the government to the public and world at large.

II. The Secret Ballot

A. History Of Voting In The United States

As the signing of the R-71 petition was equivalent to casting a vote, this case involves the most significant right held by citizens of this country, the right to freely and without hindrance vote one's conscience. The right to vote is recognized by this Court as "a right at the heart of our democracy." *Burson v. Freeman*, 504 U.S. 191, 198 (1992). The "right to vote

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[5] The R-71 petition contained language highlighted in a banner across the top stating, "[t]he legislature just passed a law that effectively makes same-sex marriages legal By signing R-71 we can reverse that decision and protect marriage as between one man and one woman" and "[i]f same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal . . even over the objections of parents. Sign R-71 to protect children" *See* Joint Appendix to Petitioners' Brief pp. 31-32.

freely . . . is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It has always been recognized as one of the most precious rights of the citizens of our country. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesbury v. Sanders*, 376 U.S. 1, 17 (1963).

Throughout history the democratic process has evolved in response to undue external influences to protect the integrity of elections and citizens' right to vote their conscience freely. During the colonial period voters cast their vote by *viva voce*, voice vote, or by a showing of hands. *Burson* at 200. Voting orally or by a showing of hands meant that your vote was known by all and that lack of secrecy naturally led to corruption, bribery, intimidation, fraud and violence.[6] Footnote 6 in the *Burson* decision describes the open corruption of the voice vote and showing of hands methods of elections:

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[6] *Id* ; *George et al. v. Mun. Election Commission of Charleston*, 335 S.C. 182, 188 (1999); *See generally* E Evans, A History of the Australian Ballot System in the United States 1-6 (1917); J. Harris, Election Administration in the United States 15-16 (1934); J. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908, pp. 8-11 (1968); G.H Utter and R.A Strickland, Campaign and Election Reform A Reference Handbook, 8-9 (1997); Wright and Graham, Federal Practice and Procedure: Evidence, 5632 (1992) (discussing history of secret ballot in connection with rejected rule of evidence on voter's privilege).

> One writer described the conditions as follows: 'This sounds like exaggeration, but it is the truth; and these are facts so notorious that no one acquainted with the conduct of recent elections now attempts a denial – that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election.'

Burson at note 6. By the late 1700s most states had begun using a paper ballot, with voters preparing their own handwritten ballot at home and then delivering the ballot to the polling place. *Id.* Seeing opportunity, political parties and candidates soon began preparing brightly colored or specially designed ballots to give to the voters. *Id.* These ballots could be recognized at a distance and once placed in the hands of a bribed or intimidated voter, the vote buyer could watch until it was placed in the ballot box. *Id.*

Approaching a polling place in those days to vote was quite literally placing oneself in mortal danger as they were "scenes of battle, murder, and sudden

death."[7] Like the *viva voce* method, the paper ballot system was fraught with corruption, fraud and abuse, leaving voters helpless pawns in the manipulative hands of the political system.[8] Voter intimidation, especially by employers, was extensively practiced:

> Many labor men were afraid to vote and remained away from the polls. Others who voted against their employers' wishes frequently lost their jobs. If the employee lived in a factory town, he probably lived in a tenement owned by the company, and possibly his wife and children worked in the mill. If he voted against the wishes of the mill-owners, he and his family were thrown out of the mill, out of the tenement, and out of the means of earning a livelihood. Frequently the owner and the manager of the mill stood at the entrance of the polling-place and closely observed the employees while they voted. In this condition, it cannot be

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[7] *Burson* at 204, quoting W. Ivins, The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association 316 (1906)

[8] A committee report of the 46th Congress describes how average citizens were hindered from exercising their own right to vote freely, "men were frequently marched or carried to the polls in their employer's carriages. They were then furnished with ballots and compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box." *Burson* at note 7.

> said that the workingmen exercised any real choice.

Id. at note 7, quoting Evans 12-13. Then, much like today, " . . . the failure of the law to secure secrecy opened the door to bribery and intimidation." *Id.* at 201.[9]

B. The Australian Ballot

To combat the violence and corruption experienced not only in the United States but worldwide in emerging democracies, an Australian lawyer by the name of Henry Samuel Chapman invented the government-printed ballot slip in 1856 that became known as the "Australian ballot" or "secret ballot."[10] Chapman's invention quickly spread from Australia to New Zealand, and then England, Canada, Belgium, and from 1888 to 1892 it made its way through half of the American states.[11] The secret ballot is widely recognized today as crucial to maintaining the integrity of the electoral process, and is

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[9] *See generally* Evans 7, 11; Harris 17, 151-152; V. Key, Politics, Parties, and Pressure Groups 649 (1952); J. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920, p. 36 (1988); Rusk 14-23.

[10] Brent, Peter, *The Australian ballot – born 1855 and still going strong*, The Canberra Times, Dec. 19, 2005.

[11] *Id.*

now used in emerging democracies like Iraq.[12] The evolution of elections over time demonstrate the need for the secret ballot and the confidentiality of citizens' political choices in a free society, which today extend to the signatures of voters on referendum petitions.

III. Privacy Concerns

A. Private Information On Petitions

The harassment, threats, intimidation and corruption that led to the vote by secret ballot in this country are just as present for modern day petition signers.[13] The risk of reprisal for a minority opposition who signs a petition is the same as that of a voter, and in fact, in some regards is even greater. When a citizen casts a secret ballot, that ballot does not contain the voter's name, home address, or email address. A secret ballot only contains the voter's opinion on the ultimate issue in the election without any identifying information regarding the voter himself. However, when a voter signs a referendum petition, the petition contains the voter's opinion on the ultimate issue as well as his personal email

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[12] *Id* . *See also* The United Nations Universal Declaration of Human Rights, Art. 21, adopted on December 10, 1948 by the UN General Assembly (available at www.un.org).

[13] *See also* Petitioners' Brief pp 2-12, describing in detail the harassment, pecuniary harm, intimidation and violence directed at voters across the country once their names, political positions and home addresses were published worldwide on the internet.

address and the home address.[14] Therefore, it is reasonably concluded that voters who sign referendum petitions have an even more urgent privacy interest in having the petitions held in confidence by the government than voters who cast secret ballots. The global publication on the internet of this personal information encompasses privacy and safety issues extending beyond the voter who signed the petition to his or her spouse, innocent children, any other individual residing with the signer, and even their neighbors.[15] In California, Proposition 8 supporters had their homes egged, floured and even urinated on.[16] Obviously, the release of the home address information of petition signatories leaves even their neighbors and their neighbors' property in peril.

B. Voter Intimidation In The Global Village

The resurgence of the problems seen before the implementation of the secret ballot, now being used to intimidate and harass voters who sign petitions, illustrate the need for maintaining the same confidentiality of the secret ballot with regard to petitions. The privacy concerns of citizens is even more

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[14] *See* Joint Appendix to Petitioners' Brief pp. 31-32.

[15] *See* Petitioners' Brief pp. 2-12 describing in detail the vandalizing of homes and damage to personal property of voters whose names, political positions and home addresses were published worldwide on the internet

[16] *See* Petitioners' Brief pp 2-12.

profound now in the "global village" of the internet realm. The "global village" as popularized in Marshall McLuhan's books *Understanding Media* and *The Global Village*, describes how the globe has been contracted into a village by electric technology and the "'all-at-onceness' character of information moving at the speed of light" to all corners of the world.[17] The ease with which voters names, email addresses, home addresses, and vote for or against a referendum petition can be disseminated around the globe, even with pictures and maps to the voters' residences and places of business, is stunning. This kind of immediate ability for dissenters around the globe to have "uncomfortable conversations" with voters against a local proposition could never have been foreseen by the founders of our country.[18] There is no way that the voters who signed the R-71 petition could have reasonably foreseen there was a possibility the personal information of where they, their children and their spouses reside would be broadcast to every corner of the world instantaneously. There is no precedent for any such event in Washington's history. Given the additional risks of identity theft and harassment from persons worldwide who disagree with

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[17] McLuhan, Marshall & Powers, Bruce R., The Global Village: Transformations in World Life and Media in the 21st Century, 1 (Oxford University Press, 1989).

[18] *See* www.knowthyneighbor.org and www.whosigned.org, advocating "uncomfortable conversations," i.e. harassment and coercion into silence, between homosexual activists and the voters who signed R-71

the R-71 petition, the publication of this and any other political petition on the internet would not only have a chilling effect on participation in the democratic process, it would freeze our democracy to a standstill.

Publication of this kind of personal information regarding the voters of the United States on the internet would even allow our enemies to participate in our government's political process through voter intimidation. With the assurance of anonymity, voices of dissent to the party in majority may exercise their right to speech without fear of reprisal. In contrast, with the threat of not only local but immediate worldwide publication of an unpopular position on a matter put to vote along with voters' private residential information, who would be bold enough to speak? Would a timid person vote their conscience in the face of global opposition? Indeed not. The danger to private citizens and their families from the instantaneous worldwide publication of this type of information increases exponentially due to the global village in which we live.

In the days before the secret ballot, workers and their families were particularly vulnerable to manipulation from employers, such as mill workers in company towns threatened with the loss of their job and home for the failure to deliver a vote for the mill owner's candidate or issue of choice.[19] Modern day

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[19] Evans 12-13.

petition signatories face the same persecution and even worse if their personal information is released and published by advocates of a different viewpoint. The compelled disclosure of the names and personal information of supporters to Proposition 8 in California led to organized boycotts and blacklists of businesses, harassment and email threats against the physical safety of supporters and their families, death threats, vandalism of personal property, staircases of homes covered in urine, individuals fired or forced to retire from their jobs, and even forced out of church membership.[20] Just like the voter intimidation that took place in the 1800s, the results of this modern-day intimidation is a severe chilling effect on individuals from engaging in political speech.[21]

This type of voter intimidation and harassment, if allowed to continue, not only affects those directly harmed by the global publication of private voter information, it cuts to the core of our civil liberties and undermines our very way of life. As this Court has stated, "[n]o right is more precious in a free country . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesbury*

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[20] *See* Petitioners' Brief pp. 2-12.

[21] *See The Shepherdstown Observer v. Maghan*, No 09-c-169 (Jefferson County, W. Va 2009) (noting "many signers of the certificates indicated that they would not have signed had they believed their names would be published."), and Petitioners' Brief p. 6, note 13 reporting harassed citizens who will not support causes in the future after having their names, addresses and political positions published worldwide on the internet.

at 17. The harassment and intimidation campaign undertaken against Proposition 8 supporters in California and R-71 signatories in Washington is far more sinister than that suffered by voters in the 1800s due to the modern realities of the global village.[22] If the names and personal information of the voters who signed the R-71 petition are released, the internet reality opens up their harassment and intimidation to anyone who logs on to the worldwide web. Wrongdoers and tormenters from every corner of the globe will be able to participate in the bullying and coercion into silence the voters against a proposition they support from anywhere in the world.

CONCLUSION

In the context of elections and referendum petitions, reprisal and intimidation against citizens for exercising their right to support or reject a candidate or initiative runs contrary to the basic tenets of our free society. Whether it's the mill owner of the 19th century firing an employee and evicting him and his family out of their company housing for voting against the mill owner's candidate of choice, or the political blogger of today posting the name and home address with Google map of a voter who signed a petition against a cause advocated by the blogger, voter intimidation is a disease that weakens our free

[22] McLuhan & Powers 1.

republic, and the secret ballot and confidentiality of political petitions are the cure.

For the foregoing reasons, Amicus Curiae Concerned Women for America respectfully file this Brief in support of Petitioners request that the decision of the Ninth Circuit be reversed.

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AMICUS CURIAE BRIEF

No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, *et al.*,
Petitioners,

v.

SAM REED, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF DIRECT DEMOCRACY SCHOLARS IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 09-559

JOHN DOE #1, *et al.*,
Petitioners,

v.

SAM REED, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF DIRECT DEMOCRACY SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI* [1]

This brief *amici curiae*, in support of Respondents, is filed on behalf of four scholars who have devoted

[1] Pursuant to Sup. Ct. Rule 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no counsel for a party or party has made any monetary contribution to the preparation or submission of this brief. Ballot Initiative Strategy Center, a District of Columbia nonprofit corporation, made a monetary contribution to the preparation of this brief; no other person other than *amici* or counsel for *amici* has done so.

much of their careers to the study of direct democracy in the United States, including the process of gathering signatures to qualify initiatives and referenda for the ballot. These scholars have a longstanding, demonstrated interest in developing an understanding of the operation of the direct democracy process in the States and, in particular, of the integrity of that process.

Daniel A. Smith is Associate Professor of Political Science at the University of Florida.[2]

Todd Donovan is Professor of Political Science at Western Washington University.

Janine A. Parry is Associate Professor of Political Science at the University of Arkansas.

Caroline J. Tolbert is Professor of Political Science at the University of Iowa.

SUMMARY OF ARGUMENT

Application of the "exacting scrutiny" standard is not appropriate in this case. Even assuming that the mere act of signing a referendum or initiative petition is "core political speech," Petitioners have not shown that public disclosure of the names of signers in any way *burdens* that speech. Such disclosure does not "compel" any speech beyond the mere fact that a voter has signed the petition. Disclosure does not infringe "privacy of identity, association and belief," as Petitioners suggest, because there is no reasonable expectation or assumption of privacy or

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[2] Affiliations are provided for each amicus for identification purposes only, and the views contained herein should not be construed to reflect the views of the institutions with which they are affiliated.

secrecy: any voter who signs a petition knows that her signature, name and address, and the fact that she is signing, are being put on paper in the hands of a stranger, in a public place, in front of others, and then submitted to a government agency. Further, public disclosure of petitions is widespread and routine in states that allow ballot initiatives and referenda. Nor does disclosure create any risk of intimidation or harassment of signers. Of the approximately 600,000 voters who signed referendum petitions in Washington in the last decade, Petitioners have failed to identify a single individual who claims to have been harassed or intimidated as a result of mere disclosure of her signature. More than a million names of signers of petitions for referenda and initiatives opposing gay marriage have been posted on the internet. Yet there is no evidence that *any* of these signers has faced any threat of retaliation or harassment by reason of that disclosure.

Even if public disclosure of petition signatures is to be subjected to "exacting scrutiny," the State's disclosure of the signatures under the Public Records Act serves sufficiently important governmental interests to find such disclosure constitutional. *First*, fraud is a widespread, significant problem in signature gathering for ballot measures. Public disclosure has in fact proven essential and indispensable in exposing such fraud in a number of states.

Second, it has been commonplace for signature-gatherers to mislead and trick voters into signing referenda and initiative petitions those voters would not have signed had they been informed of the actual content of the ballot measures. Numerous voters have discovered such deception, and have been able to remove their names or disassociate themselves

from the measure, only because their signatures were disclosed publicly. In fact, there is no way that a voter duped into signing a petition can exercise that right in the absence of public disclosure.

Third, public disclosure serves an important interest in informing voters about ballot measures. Scholarship indicates that "information brokers" such as the media and interest groups can analyze and disseminate information about who is signing petitions and how they are being collected in a way that can provide "cues" to voters, enabling those voters to make more reasoned and informed decisions about whether to support a ballot measure.

ARGUMENT

I. DISCLOSURE OF BALLOT MEASURE PETITION SIGNATURES DOES NOT BURDEN CORE POLITICAL SPEECH

Central to Petitioners' argument is the proposition that the Court should apply the "exacting scrutiny" test—equivalent, in Petitioners' view, to "strict scrutiny"—on the theory that public disclosure of the names of those signing a referendum petition burdens "core political speech." Petitioners' Brief at 40-41, Doe v. Reed, 09-559 (Feb. 25, 2010) ("Petr.'s Br."). Petitioners rely heavily on *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (*Buckley II*), in which the Court applied "exacting scrutiny" to find unconstitutional provisions of a state law requiring petition circulators to wear an identification badge and requiring ballot committees to disclose the names and addresses of, and payments made to, paid circulators. *Id.* at 201-02. Affirming that petition circulation is "core political speech," *id.* at 186, the Court found that the badge requirement

burdened such speech by forcing circulators to reveal their identities while engaged in discussion with voters, risking immediate exposure to harassment, *id.* at 199; and that the disclosure requirement burdened such speech by forcing circulators to "surrender the anonymity enjoyed by their volunteer counterparts." *Id.* at 204.

This Court has never decided whether the act of signing, as distinct from circulating, a petition is a form of "core political speech." *Id.* at 186. Even assuming that it is, however, Petitioners do not show that mere public disclosure of the names and addresses of signers in any way *burdens* that speech. Certainly such disclosure does not directly impair the ability of any voter to sign a petition. Indeed, as the Court recently held, "Disclaimer and disclosure requirements . . . 'do not prevent anyone from speaking.'" *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

Petitioners do not contend that public disclosure of petition signatures directly burdens the ability of any voter to sign a petition. Rather, Petitioners argue that such public disclosure burdens political speech by (1) compelling speech; (2) interfering with "privacy of identity, association and belief;" and (3) risking "intimidation" of signers by those opposed to their views. Petr.'s Br. at 23-35. The experience of the State of Washington and other states with the direct democracy process, however, demonstrates that public disclosure of signatures does not in fact create any of these supposed burdens.

A. Public Disclosure of Signatures Does Not "Compel" Speech

The act of placing one's name and address on a referendum or initiative petition is not a work of art or literature in which "an author generally is free to decide whether or not to disclose his or her true identity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995). All that the signer of a referendum or initiative petition is compelled to disclose is the mere fact that she supports putting the initiative or referendum *on* the ballot, not that she supports the substantive merits of the measure itself.

It is well-established that the State's interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot" may be "protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988). In order for States to be able to impose such a requirement, disclosure by a signer of her support for the proposal must be compulsory.

Petitioners suggest that the State of Washington "imposes three levels of compelled speech:" (1) signing the petition; (2) submission of the signatures to the Secretary of State for canvass and verification; and (3) release of the signatures to the public. Petr.'s Br. at 35-39. Washington law, however, does not "compel" a voter to do anything other than merely sign the petition. The question of whether public disclosure of signatures "forces" the voter somehow to disclose that she supports putting a measure on the ballot is simply another way of suggesting that the voter does not expect or want such disclosure—in other words, that public disclosure infringes the

voter's "privacy of identity, association and belief." Petr.'s Br. at 10. As indicated below, it does not.

B. Public Disclosure of Signatures Does Not Infringe "Privacy of Identity, Association and Belief"

Signing a referendum petition is not the same as voting for a candidate and is not protected by the "secret-ballot privacy interest" as Petitioners suggest. Petr.'s Br. at 21; *see also id.* at 22, 25, 41 & 50. The referendum is a *legislative* act and is central to the lawmaking process in Washington. Under the Constitution of the State of Washington, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, §§ 1 & 1(b). In order to place a statewide referendum on the ballot in Washington, proponents must file with the Secretary of State petitions containing valid signatures in a number equal to four percent of the votes cast for the Office of Governor in the immediately preceding gubernatorial election. Wash. Rev. Code § 29A.72.150.

There is no expectation or assumption of privacy at any stage of the referendum process in Washington. Each referendum petition sheet has 20 lines for signers to sign and print their names and addresses. Wash. Rev. Code § 29A.72.130. No provision of Washington law prevents the proponents of the measure—who of course have possession of the signatures—from publicly disclosing those signatures or from using them for any purpose.

Upon filing the referendum petition, the Secretary of State is charged with verifying and canvassing the names of those who have signed each petition. Under state law, the canvassing and verification process

"may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process . . ." Wash. Rev. Code § 29A.72.230. For these reasons, no rational voter in Washington could possibly expect her signature to be protected from public disclosure at any stage of the process.

In fact, there is no reasonable expectation of privacy for signers of initiative and referendum petitions in direct democracy States generally. Petition gathering tends to take place in public venues, with not only signers, but also those opting to read a petition and choosing not to sign, able to see any other names and address of those who previously signed. *See, e.g.*, *California's Voter Initiatives: Sign Here*, The Economist, Feb. 6, 2010; *Antioch Bible Church Participates in Eyman's Referendum Sunday*, Northwest Progressive Institute Official Blog, May 21, 2006, http://www.nwprogressive.org/weblog/2006/05/breaking-antioch-bible-church.html (photographs of petition-gathering for Referendum 65 outside the Lake Washington High School gymnasium); *Another Petition Drive, This Time in Lake Elsinor*, David Allyn Dokich—Serial Child Rapist/High Risk Sex Offender, Feb. 4, 2006, http://dokich.blogspot.com/2006_01_29_ archive.html (photographs of petition-gathering for "Jessica's Law" ballot initiative in 2006 at the Lake Elsinore Outlet Center in the State of California). The news media are free to photograph voters in the act of signing. *See, e.g.*, *Signature Gathering to Repeal Prop 8 Begins*, Mike Tidmus/A Blog from San Diego, Nov. 19, 2009, http://www.miketidmus.com/blog/2009/11/19/signature-gathering-to-repeal-prop-8-begins (photograph of TV cameras

taping individuals signing an initiative petition in California). And the voter herself knows she is providing the subject information—her name, address, signature, and the fact of signing—to a person that is normally a perfect stranger.

Any expectation of privacy generally is further rendered unlikely and unreasonable by the fact that public disclosure of petition signatures is widespread and routine in direct democracy States. Submitted petitions are considered public documents in at least twenty of the twenty-seven states that permit statewide initiatives and referenda. These documents are subject to the public document access requirements found in each state's Open Records Acts and are available, at a minimum, through the formal processes described in those statutes.[3] Indeed, in at least thirteen of these states, no formal request under the State's open records or freedom of information law is even required in order for any member of the

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[3] Alaska Stat. §§ 40.25.100 - 295; Ark. Code Ann. § 25-19-101 *et seq.*; Colo. Rev. Stat. § 24.72-101 *et seq.*; Fla. Stat. § 119.01 *et seq.*; Idaho Code Ann. §§ 9-337 - 347; 5 Ill. Comp. Stat. 140/1 *et seq.*; Me. Rev. Stat. Ann. tit. 21-A, § 22; Mass. Gen. Laws ch. 4, § 7 *et seq.*; Mich. Comp. Laws § 15.231 *et seq.*; Miss. Code Ann. § 25-61-1 *et seq.*; Mo. Rev. Stat. § 610.010 *et seq.*; Mont. Code Ann. § 2-6-101 *et seq.*; Neb. Rev. Stat. § 84-712 *et seq.*; N.D. Cent. Code §§ 44-04-17.1 to 21.2; Ohio Rev. Code Ann. § 149.43; Okla. Stat. tit. 24A, § 1 *et seq.*; Or. Rev. Stat. §§ 192.410 - 505; S.D. Codified Laws § 1-27-1 *et seq.*; Utah Code Ann. § 63G-2-101 *et seq.*; Wyo. Stat. Ann. § 16-4-201 *et seq.*; *see also* Nev. Rev. Stat. § 295.0858 (requiring county clerks to make copies of petitions publicly available for at least fourteen days).

public to be able to review the petition sheets and obtain the information appearing on them.[4]

Virtually any voter who signs a petition knows that his or her signature, name and address, and the fact that she signed the petition—the only facts of "identity, association and belief" at issue, Petr.'s Br. at 10—are being recorded, handed to a stranger, often in a public place, often in front of others, and submitted to a government agency. Neither in Washington nor in other direct democracy states can any voter realistically have any expectation of privacy for that limited bit of information.

C. Public Disclosure Does Not Create Any Risk of Intimidation

Petitioners make much of the alleged intimidation of financial donors to the Proposition 8 ballot committee in California, Petr.'s Br. at 2-6, and cite alleged harassment of the campaign manager for Protect Marriage Washington, the committee advocating for Referendum 71. *Id.* at 10-11. Petitioners do not, however, identify a *single* case in which a *voter signing a petition* has actually been subject to any form of harassment or intimidation as a result of public disclosure of that voter's signature, name and address on the petition.

Of the twenty-four states permitting citizens to challenge recently enacted legislation via the popular referendum, Washington ranks fourth on the all-time list of statewide referendum use. Between 1914 and

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[4] Per telephone interviews on March 18, 2010, with staff at the election authorities in Arkansas, Colorado, Idaho, Illinois, Michigan, Montana, Nebraska, North Dakota, Ohio (electronic copies available), Oklahoma, Oregon, South Dakota and Wyoming, access to petitions is available upon verbal request.

2009, proponents of referenda have filed seventy-five statewide referenda; thirty-six of those measures ultimately qualified for the ballot. Washington Secretary of State, Elections, State Initiatives and Referendums 1914-2009, http://wei.secstate.wa.gov/osos/en/InitiativesandReferenda/Pages/StatisticalSummary.aspx. Between 2000 and 2009, proponents of referenda in Washington have managed to qualify four referenda for the statewide ballot. A total of 599,284 signatures for those four referenda were submitted by the proponents (including 137,881 submitted to qualify R-71). Washington Secretary of State, Initiative & Referenda Signature Checks: A Historical Perspective, *available at* http://www.sos.wa.gov/_assets/elections/initiatives/Initiative%20%26%20Referenda%20Check%20Historical%20Stats%209-2-09.pdf. Yet, *amici* have been unable, after researching the public record and media accounts, to identify a single individual in the State of Washington who refused to sign a petition because of the possibility of having her name publicly disclosed or who claimed to have been harassed or intimidated as a result of such disclosure of his or her signature. Nor have Petitioners identified any such individual. Application of the Washington Public Records Act to public disclosure of referendum petitions does not appear to have any demonstrated chilling effect on the willingness of voters to sign such petitions.

The lack of any demonstrable threat of intimidation or harassment is not limited to Washington. In fact, it is difficult to identify any case of intimidation or harassment of a petition signer occurring during the entire previous century. Between 1906 and 2009, citizens in twenty-seven states have voted on a total of 302 ballot referenda and 2,299 ballot initiatives. National Conference of State Legislatures, *Ballot*

Measures Database, http://www.ncsl.org/default.aspx?abid=16580. Millions of citizens signed petitions for those ballot measures. With respect to the twenty-eight statewide referenda that have qualified for the ballot in thirteen States between 2000 and 2009, well over a million citizens have signed their names to petitions. Id. Yet Petitioners have identified no individual petition signer—not one—who has alleged any instance of harassment or intimidation.

Petitioners state that an organization called KnowThyNeighbor.org, an organization supporting equal marriage rights for lesbian and gay couples, "posted the names of traditional marriage supporters signing petitions in Arkansas, Florida, Massachusetts, and Oregon.[5]" Petr.'s Br. at 7 n. 14. Upwards of a million names and addresses of these individuals in three states (Arkansas, Florida, and Massachusetts) have been posted online by KnowThyNeighbor.org. Petitioners, however, have not identified a single individual who has actually faced any threat of intimidation, retaliation or harassment as a result of merely signing any of these petitions and having that signature publicly disclosed.

In April 2009, KnowThyNeighbor.org, after filing a public records request with the Arkansas Secretary of State, posted, on the internet, the names of 83,000 people who signed petitions to qualify a 2008 initiative that would make it unlawful for individuals cohabiting outside of a legally-recognized marriage to adopt or provide foster care to minors. Tom Lang,

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[5] In Oregon, KnowThyNeigbor did not post the names and addresses of those individuals who signed two referendums circulated in 2007, as neither qualified for the ballot. *See Both Referendums Fail to Qualify*, Know Thy Neighbor Oregon, http://knowthyneighbororegon.com/?p=21.

Names of Arkansas Antigay Petition Signers Posted Online, KnowThyNeighbor.org, Apr. 28, 2009, http://knowthyneighbor.blogs.com/home/2009/04/press-release-names-of-arkansas-antigay-petition-signers-posted-online.html. All the names are still accessible. *Who Signed the Anti-gay Adoption and Foster Care Petition in Arkansas*, KnowThyNeighbor.org, www.knowthyneighbor.org/arkansas. Yet an electronic search of statewide newspapers, news services, and political blogs conducted by *amicus* Professor Smith revealed only three newspaper articles, two editorials by regular columnists, two letters to the editor, and nine blog entries relating to this posting, which references cumulatively generated 208 comments. Of these, no article, posting or comment set out a single example of actual intimidation or harassment against any person who had signed the Arkansas referendum petition and whose name was posted on the Internet.

The act of signing a referendum petition may well be an instance of "core political speech." The question is whether the public disclosure of signers under the Washington Public Records Act actually burdens that speech, and if so, to what extent. Petitioners have demonstrated no actual burden. Disclosure does not limit, interfere with or impede the ability of any voter to sign a petition. No signer is compelled to disclose any information beyond what she voluntarily provides on the petition sheet. There is no reasonable expectation or assumption of privacy for that information; and the disclosure of signatures in direct democracy states is widespread and routine. Finally, there is no evidence whatsoever that disclosure of the signers of a referendum petition has ever resulted in any harassment, intimidation or retaliation.

"Election regulations that impose a severe burden on associational rights are subject to strict scrutiny. . . . If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451-52 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). In *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610 (2008), the Court applied an intermediate scrutiny test to uphold an Indiana law barring registered voters without photo identification from casting their vote at the polls, finding that although there was much hypothetical discussion of possible burdens on voters, "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 1622.

The burden imposed by public disclosure, on the act of signing a referendum petition, is slight to nonexistent. The Washington Public Records Act, in providing for public disclosure of the signers of a referendum petition, does not burden "core political speech." Neither "strict scrutiny" nor "exacting scrutiny" is appropriate.

II. PUBLIC DISCLOSURE OF PETITION SIGNATURES SERVES SUFFICIENTLY IMPORTANT GOVERNMENTAL INTERESTS

Even if public disclosure of petition signatures is to be subjected to "exacting scrutiny," as Petitioners suggest, such disclosure should still be held constitutional. "'[E]xacting scrutiny, . . . requires a 'substan-

tial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)). Public disclosure of the signers of a referendum or initiative petition has a "substantial relation" to three very important, arguably compelling, governmental interests: (1) ensuring the validity of the signatures submitted and uncovering fraud; (2) providing recourse to voters who were misled into signing a petition and who specifically do not wish to "speak" in favor of the referendum; and (3) informing the voters, particularly through intermediaries who distill, analyze and disseminate information based on petition sheets, of who is supporting the referendum.

A. Public Disclosure Is Essential In Order to Expose Fraudulent Practices in Signature-Gathering

"States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley II*, 525 U.S. at 191. The State has a legitimate interest "in making sure that an initiative has sufficient grass roots support to be placed on the ballot," and the State may protect that interest "by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988). Allowable measures include those which "aim[] to protect the integrity of the initiative process, specifically to deter fraud and diminish corruption." *Buckley II*, 525 U.S. at 204-05. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . .

While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008).

Fraud is in fact a significant problem in signature gathering for ballot measures. And contrary to Petitioners' suggestion that "no fraudulent signature has been detected by such [public] release," Petr.'s Br. at 13, public disclosure has in fact proven essential and indispensable in exposing fraud in signature gathering for initiatives and referenda.

1. Fraud Is a Significant Problem in Signature-Gathering for Ballot Measures

Today, as in years past, the signature gathering process for referenda in Washington and other states is dominated by well-funded organized interests. "[P]olitical interests with sufficient funding and professional assistance can qualify nearly anything they want for the ballot." Philip Dubois & Floyd Feenery, *Lawmaking by Initiative: Issues, Options and Comparisons* 102 (1998). As one study found, "citizens are often purposely approached at inconvenient times, when they will often sign the petition just to get on with their business," and "[c]irculators often also misrepresent the substance of the measure." Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 63 (1989). "Most of the time people do not ask to read [a] petition," and "[p]etition circulators seldom offer to read it." *Id.* According to another study, "[p]etitioners report that they can gather several thousand signatures and have not one signer read the petition language when she signs. Instead signers choose to sign or not to

sign based entirely on an abbreviated oral representation made by the solicitor." Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 47, 101 (1995).

As a historian of the process argues, the politics of direct democracy has "has always centered on well-heeled interest groups using the process for their purposes." Thomas Goebel, *Direct Democracy in America* 196 (2002). Even populist-sounding ballot propositions frequently rely on financing from "vested interests." Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* 13 (1998). There are well-documented instances of fraud in the signature gathering process in many of the states permitting either or both the statewide initiative or referendum processes. Todd Donovan & Daniel A. Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions, in Election Fraud: Detecting and Deterring Electoral Manipulation* 132-34 (Michael Alvarez et al. eds., 2008). High-cost referendum campaigns have existed since the adoption of direct democracy early in the twentieth century, and petition circulators—paid and unpaid—have occasionally engaged in fraud to boost the likelihood that they will have sufficient signatures to qualify. Daniel A. Smith and Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer*? 14 J. Pol'y Hist. 349, 362 (2002); Richard Ellis, *Democratic Delusions: The Initiative Process in America* 67-74 (2002).

Throughout the history of direct democracy, there have been numerous cases in which signature fraud has proven to be decisive in causing referenda to be certified for the ballot. For example, in Oregon in

1912, an investigation found that 60 percent of roughly 13,000 submitted signatures on a referendum petition to overturn certain appropriations were either forged or fraudulent. The *Eugene Register* opined, "fraud and forgery [are] becoming an annual scandal. . . . that threatens to bring popular government into disfavor." Ellis, *supra* at 184. In 1917, saloon keepers and bartenders in Ohio—fearing that women would cast ballots in favor of prohibition—engaged in widespread signature-gathering fraud to qualify a referendum repealing women's suffrage. C. Ewing, *Sufficiency Certification of Initiatives in Oklahoma*, 31 Am. Pol Sci. Rev. 65, 70 (1937).

Scholars have documented many additional examples in the modern era. In numerous states, "questionable methods of obtaining signatures have been used in nearly every state that permits the initiative," including adding fictitious names to petitions, forging names from phonebooks, and transferring names of legal voters from one sheet to another. Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 62 (1989). In the early nineteen-eighties in Colorado, for example, proponents of a measure to legalize casino gambling submitted petitions with 25,000 fraudulent signatures—including the forged name of a Denver judge. David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 63 (1984). Signature gatherers in Florida in the 1990s were found to have filed fraudulent signatures on constitutional amendments that included names copied directly out of phone books and names of deceased voters. Florida State Commission on Government Reform and Oversight, Citizen Initiative in Florida: A Review of the Citizen Initiative Method of Proposing Amendments to the Florida Constitution 33 (1995);

see also, P.K. Jameson & Marsha Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process*, 23 Fla. St. U. L. Rev. 417, 448 (1996).

More recently, thousands of fraudulent signatures were found on petitions filed in Massachusetts to qualify a measure banning same-sex marriage. The Massachusetts legislature held hearings to document examples of petition fraud associated with work conducted in Massachusetts by California-based Arno Political Consultants in 2005 during the campaign, and the Massachusetts Attorney General subsequently conducted a criminal investigation. Casey Ross, *Group Labels 2000 Names on Gay List Fraudulent*, Boston Herald, Jan. 26, 2006, at A8; Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Associated Press, Feb. 28, 2006.

Also in 2005, in Maine, a municipal clerk noticed irregularities with submitted signatures on a ballot measure. John Christie, *Forgeries Raise Question About Role Money Plays in Petition Process*, Bangor Daily News, Feb. 4, 2010, *available at* http://www.bangordailynews.com/detail/136144.html. She contacted those registered voters who supposedly signed the petitions. *Id.* One woman who was summoned by the clerk—a former city councilor—recalled that she was "appalled" and "shocked" when she saw the petition, as her signature did not come close to resembling the way she signed her name. *Id.* Becoming suspicious, the clerk checked every name on all five petitions submitted by the signature gatherer. *Id.* She discovered that every signature on the petitions was fabricated; the signature gatherer had lifted the supposed signature out of the local phonebook. *Id.* It turned out that one paid petition

gatherer had forged more than 300 signatures, names, and addresses on the petition. *Id.*

Professional paid signature gatherers have been known to use deceptive tactics to draw potential signers to their petitioners. For example, in Montana in 2006, in an action challenging the certification for the ballot of an initiative that would have imposed constitutional limits on the spending and taxing power of the State, the trial court found that "a number of paid out of state signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing." *Montanans for Justice v. Montana*, No. CDV-06-1162(d), slip op. at 12 (8th Jud. Dist., Sept. 13, 2006) (*Montanans for Justice*), *aff'd*, 146 P.3d 759 (Mont. 2006).

Clearly fraud can pose a potentially significant problem in the signature-gathering process for ballot initiatives and referenda. The State of Washington has a very important interest in preventing, exposing and remedying such fraud. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008) ("[N]ot only is the risk of voter fraud real but [] it could affect the outcome of a close election. . . . There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

2. Much Fraud Can Be Exposed and Remedied Only Through Public Disclosure of Petition Signatures

Under Washington law, referendum signature petitions are filed with the Secretary of State, who is then obligated to verify and canvass the names of voters on the petition. Wash. Rev. Code § 29A.72.230. As noted, this canvass of signatures may be observed

by persons representing the advocates and opponents of the measure, but the Secretary may limit the number of observers to two per side and observers are prohibited from copying down information from the petitions. Wash. Rev. Code § 29A.72.230. Anyone "dissatisfied" with the Secretary's decision that a referendum has qualified for the ballot can bring an action in Superior Court. Wash. Rev. Code. § 29A.72.240.

As the Court of Appeals correctly observed, public disclosure of the petitions under the Public Records Act "is necessary to make meaningful use of the state superior court challenge . . . . The superior court procedure would be at best inefficient and at worst useless, if citizens have no rational basis on which to decide whether they are 'dissatisfied' with the Secretary of State's determination. . . . And they cannot gain that understanding without the right to inspect the petition sheets." *Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). Indeed, only by scrutinizing petition sheets *in toto*, rather than simply observing randomly-drawn signatures from across petitions, can citizens identify suspect patterns of signatures, such as identical handwriting for supposedly different voters and multiple signatures on different petitions by the same individual. Similarly, only by scrutinizing full petition sheets can citizens detect other types of fraud, such as one person falsely signing as a circulator for petitions circulated by another person.

For example, an independent analysis was conducted on the petitions submitted for a Washington initiative submitted in 2006, I-917. The Secretary of State found the initiative to have an insufficient number of valid signatures; 218,786 (82.3 percent)

of the roughly 266,000 submitted signatures were found to be valid. Todd Donovan & Daniel A. Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions, in Election Fraud: Detecting and Deterring Electoral Manipulation* 138 (Michael Alvarez et al. eds., 2008). The independent analysis found, in addition, however that there were more than 300 individuals who signed an I-917 petition three or more times, and at least fifty percent of the twenty signatures submitted on fifteen separate I-917 petitions were found to be invalid. *Id.* at 139-40. This type of analysis would, of course, be impossible without the public disclosure of submitted petitions.

In fact, in a number of recent cases, significant fraud in signature-gathering was detected only by virtue of the fact that citizen opponents of ballot measures had full access to the petitions and were thereby able to conduct the type of in-depth, time-consuming analysis necessary to detect fraud. In Montana in 2006, several ballot issue committees hired out of state firms to gather signatures on three different ballot initiatives. *Montanans for Justice* at 2. The Secretary of State found that sufficient signatures had been collected and certified all three measures for the ballot. *Id.* at 22-23.

Groups of citizens opposed to the ballot measures requested access to the submitted petitions, analyzed them, and challenged the certification of all three measures. *Id.* The challengers were able to determine, for example, that circulators had falsely sworn to witnessing signatures, based on the fact that a single paid signature-gatherer swore to having witnessed persons signing the petition in areas of the state hundreds of miles from each other, on the same day. *Id.* at 9-11. The citizens groups were also able

to demonstrate that proponents' out of state paid signature gatherers had provided false or fictitious addresses in the sworn certifications required by state law. *Id.* at 9, 17. Finally, the challengers were able to produce specific signers of the petition who attested that they were personally misled by a signature-gatherer into signing multiple petitions when they intended to sign only one. *Id.* at 12-16.

The citizens groups presented this evidence in an action challenging the State's certification of the ballot measures. Based on this evidence, the trial court found that the signature-gathering practices constituted a "pattern and practice of fraud and procedural defect . . . prevalent throughout the statewide signature gathering process," *id.* at 42; invalidated numerous signatures; and invalidated the Secretary of State's certification. *Id.* at 44-46. The Montana Supreme Court affirmed, *Montanans for Justice v. Montana*, 146 P.3d 759 (Mont. 2006), agreeing with the trial court that there was a "'pervasive and general pattern and practice of fraud'" and ruling that "if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature." *Id.* at 776-78.

In 2008, the Montgomery County, Maryland, County Council enacted an ordinance, adding gender identity as a protected characteristic under the county's anti-discrimination laws. A citizens group opposed to the law gathered signatures on a petition to have a referendum on the bill. *Doe v. Montgomery County Board of Elections*, 962 A.2d 342, 344-45 (Md. 2008). The county board of elections found that a sufficient number of signatures had been collected, and certified the referendum for the ballot. *Id.* at 345.

Citizens supporting the law and opposed to the referendum obtained access to the petition sheets and challenged the validity of the petition. *Id.* Those citizens determined, among other things, that 10,876 of the 26,813 signatures that had been submitted and accepted by the county elections board in fact did not match the names of voters as listed on the voter registration rolls, as required by state law. *Id.* at 359-60. The challengers were only able to determine this by examining all of the actual petition sheets: "Extensive review of all the signatures on the [proponent] petition pages validated by the BOE, and comparison with Montgomery County voter registration records provided by the BOE, reveal that thousands of the signatures submitted by [the proponents] and credited as valid by the BOE in fact do not comply with basic, specific legal requirements detailed in controlling Maryland and Montgomery County election law." Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 15, *Doe v. Montgomery County Board of Elections*, Civ. No. 293857 (Circuit Ct. Montgomery County, Md., June 2, 2008). The challengers also contended that the number of signatures required by the elections board was too low because the statutory percentage had been applied to a total number excluding "inactive" voters. *Doe v. Montgomery County Board of Elections*, 962 A.2d 342, 359 (Md. 2008). The circuit court rejected the challenges, but the Maryland Court of Appeals reversed and ordered the referendum off the ballot, finding that the wrong number of signatures had been required and that, in any event, even the lower number would not have been satisfied because "the 10,876 challenged signatures were invalid as a matter of law." *Id.* at 363. Those signatures would never have been held invalid but for the public

disclosure of the petition signatures, enabling citizen opponents of the referendum to review and analyze all of the signatures.

Thus, fraud at times is pervasive and persistent in the signature-gathering process for initiatives and referenda. Much more actual demonstrated fraud has taken place in this process, for example, than was demonstrated in *Crawford* with respect to voter impersonation. *See Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610, 1619 (2008) ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history"). Surely the State of Washington, and other States, have a very strong interest in exposing and remedying fraud in signature-gathering.

B. Public Disclosure Is Essential In Order to Provide Recourse to Voters Who Are Misled Into Signing a Petition

"[A] corollary of the right to associate is the right not to associate." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). While Petitioners emphasize the associational rights of those citizens who choose to sign a ballot measure petition, Petr.'s Br. at 24-26, they ignore the rights of those citizens who are tricked or misled into signing a petition, and want to be able to *disassociate* themselves from the particular ballot measure and its supporters.

As noted above, a Montana trial court found that "signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing." *Montanans for Justice* at 12. In Massachusetts in 2005, signature-gatherers for an initiative to make same-sex marriage unconstitu-

tional were discovered to be using similar bait-and-switch tactics to trick voters into signing the petition. Kathleen Shaw, *Tricks on Petitions Described by Worker Student Employed to Gather Names*, Worcester Telegram, Oct. 13, 2005, at A1. One signature-gatherer stated that "co-workers informed her she could make more money if she induced people first to sign a petition regarding wine sales, then slip the petition to ban same sex marriage underneath and ask unsuspecting people to sign the second copy without telling them what it concerned." *Id.* Nearly a dozen voters testified before a committee of the state legislature that "petitioners for a campaign to outlaw gay marriage tricked residents into signing their petition by telling them it was a petition to allow the sale of wine in a grocery store." Amy Lambiaso, *Signature-gathering Fraud Charges Stir Call for New Laws, Oversight*, State House News Service, Oct. 18, 2005, *available at* http://masse quality.org/news/story.php?/type=news &id=163.

Without public disclosure of petition signatures, there is no way that a voter duped into signing a petition can disassociate herself from that petition—either by formally withdrawing her signature, if permitted by state law, or by some form of public notice that she did not intend to sign. In some states, including Alaska, Nevada and Utah public access to signatures on petitions facilitates the right to signature revocation by those who have signed petitions. Alaska Stat. § 15.45.120; Nev. Rev. Stat. 295.055(4); Utah Code Ann. § 20A-7-205(3). In Utah, citizens are permitted to remove their names from ballot petitions for any reason. Utah Code Ann. § 20A-7-205(3).

Public disclosure is the only way to alert citizens who suspect they might have been duped into signing

a petition that they have in fact signed it. One Washingtonian, who responded to a blog posting on the Washington Secretary of State's webpage, was looking forward to the public disclosure of R-71 petitions, as he wanted to verify that he was not duped into signing it. BobVB wrote:

> I was confronted by a signature gatherer for the King County proposition of having some district council members. I signed that. Later coming out I see he had carefully folded R-71 ballots that basically just showed the signature portion, absolutely none of the initiative they were for.
>
> I still don't know if I was slipped an R-71 ballot . . . I look forward to seeing if my signature is surprisingly on an R-71 petition—is there any recourse for a citizen that has been tricked into signing something they had no intention of signing?

Posting of BobVB to Washington Secretary of State Blog, http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/07/r-71-update-signature-requests-pending/ (July 29, 2009, 09:28 PST).

As this example makes clear, public disclosure of signatures on referendum petitions allows citizens to detect if they signed a petition under false pretenses, were misled into signing, or were even deceived or lied to when approached by a signature gatherer. In Massachusetts, the public disclosure on the web by KnowThyNeighbor.org of the individuals who signed petitions to ban gay marriage led not to harassment or intimidation of those signers, but rather to the realization by thousands of citizens that they had been duped into signing the petition, thinking they were signing a petition to *permit* gay marriage. Steve

LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Associated Press, Feb. 28, 2006. Those citizens then asked to have their names removed from the website. *Id.* A group opposing the initiative, Mass Equality, "heard from more than 2,000 people who said they either didn't sign the petition or were tricked into signing it." *Id.*

The State surely has a strong interest in enabling those tricked or misled citizens to disassociate themselves from the petition, either by formal withdrawal if permitted by state law or by public notification to organizations (such as KnowThyNeighbor.org) that share their views. That interest is intertwined with the State's inherent interests in preserving the integrity of the ballot process and promoting transparency, but the significance of that interest is increased by the need to protect the associational rights of individual voters. Those rights simply cannot be protected without public disclosure of petition signatures.

C. Public Disclosure Serves an Important Interest in Informing Voters

The Court of Appeals recognized that the State of Washington has an important "informational interest" in informing voters of who is supporting a referendum. *Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). Indeed, the Court reasoned that disclosure of signatories serves an informational interest even more compelling than disclosure of financial supporters of ballot measures, because "[r]eferendum petition signers . . . have taken action that has direct legislative effect. The interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot measure." *Id.*

Petitioners contend that this informational interest is minimal because the signing of a petition merely indicates a voter's desire to put a measure on the ballot, not actual support of the measure. Petr.'s Br. at 13, 49. Petitioners further contend that disclosure of signatures plays no meaningful role in educating voters. *Id.* at 51-52.

As scholars of voting behavior know well, however, voters tend not to be deeply informed about issues. Robert Erikson & Kent Tedin, *American Public Opinion* 16 (2005). When it comes to ballot measures, voters tend to depend on cues from political parties, interest groups, the media, as well as information brokers. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Elec. L. J. 295, 326 (2005). With referenda and initiatives, which are often low-information affairs and lack partisan cues on the ballot, voters have little to draw on to make informed choices besides the ballot title, summary, or text of a measure, which are often convoluted. David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 118-20 (1984). As election time nears, potential voters on ballot measures often look to information brokers or for shortcuts on how to vote, including informational cues provided by elites, interest groups, and party leaders. Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting and Direct Democracy* 58-61 (1998); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior, in California Insurance Reform Elections* 88 Am. Pol. Sci. Rev. 63, 76 (1994).

Additional information procured from the application of open records laws to the disclosure of referendum petitions can enhance the ability of ordinary

voters to understand the likely consequences of a vote for or against a particular ballot question, facilitating a "reasoned choice." Arthur Lupia & Matthew D. McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know in Elements of Reason: Cognition Choice and the Bounds of Rationality* 48-49 (Arthur Lupia et al. eds., 2000); *see also*, Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums in Referendum Democracy: Citizens, Elites and Deliberation, in Referendum Campaigns* 191 (Matthew Mendelsohn & Andrew Parkin eds. 2001). Just as individuals rely on shortcuts to help them make daily choices, citizens can obtain cues gleaned from information about who is signing petitions and how they are being collected (especially if they are paid petitioners), which may help them decide whether to support or oppose a particular ballot question. Lupia & McCubbins, *supra* at 37. Public disclosure of referendum petitions can provide relevant information to information brokers who can distill it and bring it to the attention of prospective voters. As with publicly disclosed campaign finance data, such information gains may be difficult to measure precisely, but they are hardly marginal.

Contrary to Petitioners' claims that there is a "disconnect between public perception and actual evidence regarding disclosure," Petr.'s Br. at 43, the well-established theory of the "informed voter" has little to do with voters' ability to access lists of those who contribute to ballot issue campaigns in the state. Rather, the theoretical justification for the public disclosure of campaign finance data—and by extension, signatures collected to qualify a referendum—is

that publicly-disclosed records can be used not only by prospective voters, but also by *information entrepreneurs*, such as journalists, nonprofit organizations, think tanks, scholars, political parties, interest groups, and of course supporters and opponents of ballot issues. Information entrepreneurs are able to provide cues to prospective voters that may help improve voter competence. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Elec. L.J. 295, 298 (2005).

Most citizens have limited time and attention to devote to political campaigns. It therefore defies reason to expect that many prospective voters will directly avail themselves of information resulting from disclosure of campaign finance data of ballot issues, much less specific signatures on referendum petitions. Dick M. Carpenter II, Institute for Justice, Disclosure Costs: Unintended Consequences of Campaign Finance Reform 2 (2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf [hereinafter Carpenter Report]. Indeed, there is little expectation that prospective voters will themselves become deeply immersed in campaign finance reports or in viewing names on submitted referendum petitions. This does not mean, however, that public disclosure such information is not valuable to voters. For example, the disclosure of campaign finance activities of ballot issues committees is frequently used by information entrepreneurs to convey relevant and credible information to voters. Garrett & Smith, *supra* at 297. Similarly, though many voters may not have direct knowledge about the laws, accessibility, and tools to access signatures submitted on petitions, information entrepreneurs—

such as http://KnowThyNeighbor.org and http://www.whosigned.org,—are able to use public disclosure laws to access, compile, and disseminate information to voters. Citizens can then use this information, either directly or in a distilled form, to help inform their voting decisions. By synthesizing publicly disclosed campaign finance data, informational entrepreneurs provide heuristics, or voting cues, to citizens that may improve their ability to vote consistently with their own preferences that is, casting "the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision." Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections, in Citizen Competence and Democratic Institutions* 149 (S.L. Elkin & K.E. Soltan, eds. 1999). As with campaign finance disclosure laws that serve an informational function, public disclosure of names on referendum petitions may improve voter competence.

There is strong support in the State of Washington and other direct democracy states for public disclosure in citizen lawmaking. According to a 2009 statewide poll, Californians favor increasing public disclosure of funding sources for signature gathering and campaigns (81% favor, 14% oppose). Mark Baldassare, Dean Bonner, Jennifer Paluch & Sonia Petek, Public Policy Institute of California, Californians & Their Government (2009), *available at* http://www.ppic.org/content/pubs/survey/S_909MBS.pdf. Disclosure in ballot issue campaigns is widely accepted by the public. As cited in Petitioners' Brief, at 43-44, a 2006 Institute for Justice survey of 2,221 residents of six initiative states (California, Colorado, Florida, Massachusetts, Ohio, and Washington) found that 82.3 percent of respondents agreeing with

the statement, "The government should require that the identities of those who contribute to ballot issue campaigns should be available to the public." Carpenter Report, *supra*, at 7. There is no reason to think that these citizens would not be equally supportive of having public disclosure apply to the signature gathering process of ballot issue campaigns.[6]

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[6] Petitioners cite the Carpenter Report for the proposition that fear of public disclosure inhibits individuals from contributing to ballot measure campaigns. Petr.'s Br. at 44-45. Without offering any empirical evidence from the six-state survey data that directly tests this assertion, the Carpenter Report concludes that "the cost of disclosure seems to include a chilling effect on political speech and association as it relates to ballot issue campaigns." Carpenter Report at 19. In order to make this claim, however, the survey would have to show that an individual who has made a campaign contribution to a ballot issue committee in the past, or who is likely to make a campaign contribution to a ballot issue committee in the future, would be dissuaded from doing so once she became informed that certain personal information would be publicly disclosed. The Carpenter Report fails to show that this is the case. Indeed, in Washington alone, proponents and opponents of the three initiatives on the 2008 November ballot received more than $9 million from more than 20,000 contributors. National Institute on Money in State Politics: Washington 2008, Ballot Measures, http://www.followthemoney.org/database/StateGlance/state_ballot_measures.phtml?s=WA&y=2008&so=p#sorttable; Washington Public Disclosure Commission, http://www.pdc. wa.gov/. Despite the alleged "burden" of campaign finance disclosure in Washington, however, these 20,000-plus contributors evidently were unimpeded in their political speech by disclosure laws. Unlike the actual signing of *referendum* petitions—which as the Petitioners correctly assert does not necessarily express support for the ballot measure itself, Petr.'s Br. at 21—contributions to ballot *initiative* committees strongly signal one's support or opposition of a ballot measure. It is difficult to make the case that the supposed "burden" of disclosing contributions to ballot issues in Washington suppresses political giving.

For these reasons, the State's "informational interest" in public disclosure of petition signatures is a significant one. Equally important, if not compelling, are the State's interests in preventing, exposing and remedying fraud in signature collection and in enabling citizens who have been misled into signing a petition to withdraw their signatures or disassociate themselves from it. Only public disclosure of petition signatures can achieve these interests. Accordingly, even if "exacting scrutiny" is applied, the public disclosure of petition signatures bears a "substantial relation" to "sufficiently important governmental interests." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66) (1978)).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Petitioners,

v.

SAM REED et al.,

Respondents.

On a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and Telecommunications Association v. Federal*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioners' and Respondents' letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. Matthew Phillips, EPIC Appellate Advocacy Counsel, contributed to the preparation of this brief.

Communications Commission, 555 F.3d 996 (D.C. Cir. 2009); Bunnell v. Motion Picture Association of America, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in protecting anonymous political speech and the privacy of citizens who submit information to the government. EPIC's advisory board includes distinguished experts in privacy law and technology who have written about the right of anonymity and developed techniques to safeguard anonymity.[2]

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[2] *See, e.g.*, Grayson Barber, *Electronic Health Record and the End of Anonymity*, 198 N.J.L.J. 227 (2009) ("[C]omputer scientists have shown that anonymous data can be re-identified easily. . . . In short, we must protect our digital records from re-disclosure. Computers cannot do this without the force of law."); David Chaum, *Achieving Electronic Privacy*, Scientific American 96-101 (Aug. 1992) ("Over the past eight years, my colleagues and I . . . have developed a new approach, based on fundamental theoretical and practical advances in cryptography, that . . . avoid the possibility of fraud while maintaining the privacy of those who use them [to complete transactions]."); David Chaum, *Punchscan, Voting Method*, http://punchscan.org ("There are ongoing efforts by technologists to develop better models for conducting more private, secure, and reliable balloting methods for public elections. One method that has many of the features necessary for a public election is Punchscan"); Ronald L. Rivest and Warren D. Smith,

Three Voting Protocols: Three Ballot, VAV, and Twin (2007), *available at* http://people.csail.mit.edu/rivest/RivestSmith-ThreeVotingProtocolsThreeBallotVAVAndTwin.pdf ("Voters traditionally have been anonymous 'going into' the voting process (submitting ballots). Floating receipts now provide a new layer of anonymization 'coming out' (taking home receipt copies)."); Gary T. Marx, *What's in a Concept? Some Reflections on the Complications and Complexities of Personal Information and Anonymity*, 3 U. OTTAWA L. & TECH. J 1, 19 (2006) ("We seek privacy and often anonymity, but we also know that secrecy can hide dastardly deeds and that visibility can bring accountability. But too much visibility may inhibit experimentation, creativity and risk taking."); David Chaum, *Secret-Ballot Receipts: True Voter-Verifiable Elections, Presented at ITL Seminar Series*, Nat'l Inst. of Standards & Tech. (May 19, 2004); Stefan Brands, *Non-Intrusive Cross-Domain Digital Identity Management*, Presented at Proceedings of the 3rd Annual PKI R&D Workshop (Apr. 2004), *available at* http://www.idtrail.org/files/cross_domain_identity.pdf ("The distinction is critical, many authentication systems provide security while preserving anonymity by allowing for the separation of attributes and identification."); Alessandro Acquisti, Roger Dingledine, and Paul Syverson, *On the Economics of Anonymity*, Financial Cryptography, 84-102 (2003) ("Individuals and organizations need anonymity on the Internet. People want to surf the Web, purchase online, and send email without exposing to others their identities, interests, and activities."); Latanya Sweeney, *Anonymity: A Model for Protecting Privacy*, International Journal on Uncertainty, Fuzziness and Knowledge-based Systems, 10 (5), 557-70 (2002) ("In many cases the survival of the database itself

EPIC supports the right of individuals to remain anonymous while voting and while engaging in Constitutionally protected political speech. EPIC has filed several *amicus* briefs in this Court concerning the critical importance of protecting the anonymity of political speakers and voters.[3] EPIC argues in this

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depends on the data holder's ability to produce anonymous data because not releasing such information at all may diminish the need for the data, while on the other hand, failing to provide proper protection within a release may create circumstances that harm the public or others."); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425 (2000) ("The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition."); Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 756 (1999) ("There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being. It is not simply that people need opportunities for privacy; the point is that their well-being, and the well-being of the liberal way of life, requires that they in fact experience privacy."); Jerry Kang, *Cyberspace Privacy*, 50 STAN. L. REV. 1193, 1209 (1998) ("[W]e must recognize that anonymity comes in shades. Although no specific individual is identified facially, the individual may be identifiable in context or with additional research. . . .").

[3] *See, e.g., Brief of Amici Curiae Electronic Privacy Information Center, American Civil Liberties Union, American Civil Liberties Union of Ohio and 14 Legal Scholars in Support of Watchtower Bible, etc. Petitioners,*

brief that the state should not compel the disclosure of the identity of those who express their political views by means of the petition process.

The Ninth Circuit's determination in the present case threatens to expose the identity of petition signatories, individuals engaging in political speech – political speech that is often controversial. The Ninth Circuit decision, if upheld, threatens to deprive political speakers of their right to anonymity, and places them at risk of retribution and intimidation.

Technical Experts and Legal Scholars

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Professor of Law and Professor of Philosophy,
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James Bamford
Author and Journalist

David Banisar
Visiting Research Fellow, University of Leeds,
Non-Resident Fellow, Stanford University

Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002), *available at* http://www.epic.org/anonymity/watchtower.pdf (supporting First Amendment Right to anonymous door-to-door speech); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), *available at* http://www.epic.org/privacy/voting/crawford/epic_sc_111307.pdf (opposing voter photo-ID requirements as infringing on citizens' right to cast a secret ballot).

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SUMMARY OF THE ARGUMENT

The privacy of petition signatories safeguards fundamental First Amendment interests and helps to ensure meaningful participation in the political process without fear of retribution. History has made clear the real risks to those whose names on referendum petitions are not protected from improper disclosure. Much as states safeguard the secret ballot to protect the privacy of voters, states such as Washington have taken measures to protect the identity of those who sign petitions. Even though it may be possible to observe a person signing a petition in a public place or to notice a name on a list of other signatures, this hardly constitutes waiver as the Court made clear in the *McIntyre* decision. Further, courts have considered and previously rejected the view that petitions should be disclosed under open government statutes. Courts have also recognized that in some areas, a fundamental right to privacy is a necessary safeguard against the consequences of the disclosure of personal information. In few areas can this be more compelling than the expression of support for causes that may be controversial, unpopular, or simply abhorrent.

ARGUMENT

I. Referendum Signatories are at Risk of Retribution if Their Identities are Made Public

Parties have described in the detail the experiences of Proposition 8 and R-71 supporters who sought to express their political views through their participation in the referendum process and were then subject to ridicule, but this is hardly an isolated event. In the U.S. and other countries, petition signatories have frequently faced retribution. Signatories have been harassed, intimidated, threatened, arrested, and injured because of their decision to support a petition. This experience underscores the need to safeguard the privacy interests of Referendum 71 signatories, particularly in view of the broad consensus that rapid technological change necessitates vigilant maintenance of cherished privacy safeguards. As one of the current Justices once wrote:

> [W]e sense a great threat to privacy in modern America; we all believe that privacy is too often sacrificed to other values; we all believe that the threat to privacy is steadily and rapidly mounting; we all believe that action must be taken on many fronts now to preserve privacy.[4]

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[4] SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA 1 (1972) ("Report of the Chairman") (on file with *amici*).

A. Petition Signatories in the United States Have Endured Retribution

There have been many instances of retaliation against petition signatories in the United States, but none are more famous than those undertaken by the McCarthy-era House Un-American Activities Committee.[5] In the 1960s the Un-American Activities Committee pursued a number of "suspected communists." Hearing records indicate that many of these suspects were named based on their participation as signatories in a variety of petitions, including a Petition to free Earl Browder,[6] Communist Party Election Petitions,[7] Communist Party Nominating Petitions,[8] a petition to Governor

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[5] Individuals have also been subject to retribution for political speech outside the petition context. Perhaps most notably, *NAACP v. Alabama* struck down an Alabama law requiring disclosure of the NAACP's membership list. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Court noted that the NAACP was able to show that in the past, disclosure of the information had exposed members to economic reprisal, loss of employment, threats of physical coercion and other public hostility. *Id.* at 462.

[6] *Hearings Regarding the Communist Infiltration of Labor Unions: Hearing before the H. Comm. on Un-American Activities*, 81st Cong. 659, 674-77, 680 (1949), *available at* http://www.archive.org/stream/hearingsregardin01unit#page/n3/mode/2up.

[7] *Id.* at 665.

[8] *Id.* at 668.

Olsen of California to free Sam Darey,[9] a petition for the American Committee for Democracy and Intellectual Freedom,[10] a petition for the National Federation for Constitutional Liberties,[11] petitions against the Mundt-Nixon Bill,[12] and numerous other organizations. Witnesses before the Committee linked individuals with petitions they signed, then identified the individuals as communists (often as the basis of petition involvement).[13] Many individuals named as communists suffered personal, political, and professional repercussions from these hearings.[14]

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[9] *Id.* at 672.

[10] *Id.* at 678.

[11] *Id.* at 679.

[12] *Expose of the Communist Party of Western Pennsylvania: Hearing before the H. Comm. on Un-American Activities*, 81st Cong 1292, 1293 (1950), *available at* http://www.archive.org/stream/exposofcommuni01unit#page/n3/mode/2up.

[13] *Id.* at 1293, 1296-97, 1319.

[14] ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (1994), *available at* http://www.writing.upenn.edu/~afilreis/50s/schrecker-blacklist.html.

In a recent opinion column for *The New York Times*, historian and broadcaster Studs Terkel told of the retaliation against him, stating:

> In the 1950s, during the sad period known as the McCarthy era, one's political beliefs again served as a rationale for government monitoring. . . . I was among those blacklisted for my political beliefs. My crime? I had signed petitions. Lots of them. I had signed on in opposition to Jim Crow laws and poll taxes and in favor of rent control and pacifism. Because the petitions were thought to be Communist-inspired, I lost my ability to work in television and radio after refusing to say that I had been 'duped' into signing my name to these causes.[15]

Like many politically active Americans at the time, Mr. Terkel was investigated and monitored by the FBI.[16] FBI records have also frequently noted petition signatures in investigation files. Historian John Hope Franklin, who was a vocal supporter of "Communist" W.E.B. Dubois, had a full file at the FBI. The file included documents noting Franklin's

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[15] Studs Terkel, *The Wiretap This Time*, N.Y. Times, Oct. 29, 2007, http://www.nytimes.com/2007/10/29/opinion/29terkel.html.

[16] Paul Robeson, *FBI Tracked "Working" Man, Studs Terkel*, NYCity News Service, Nov. 15, 2009, http://nycitynewsservice.com/tag/paul-robeson/.

signature on a petition against the McCarthy-era Committee on Un-American Activities.[17] When John Lennon and Yoko Ono's FBI files were revealed, the files noted the fact that Lennon and his wife, Yoko Ono, had signed a petition in support of the Cambodian monarchy when the South-East Asian nation was being bombed by the US during the Vietnam War.[18]

There are recent examples of retaliation against petition signatories, as well, some involving matters of local concern. In Northern Michigan, the signatories of a recall petition expressed concerns about retaliation after state troopers began knocking on the doors of citizens who signed the petition.[19] Petition signatories reported that officers were "harassing" and practicing "retaliation and intimidation."

The experience of the petitioners is only the most recent of those who have sought to express political views through the referendum process. In February

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[17] Justin Elliott, *The John Hope Franklin File, FBI Looked at Esteemed Historian for Communist Ties*, Talking Points Memo, Dec. 15, 2009, http://tpmmuckraker.talkingpointsmemo com/2009/12/the_john_hope_franklin_file_fbi_probed_communist_ties.php

[18] News.com.au, *FBI Lennon Files Pretty Mundane*, Dec. 21, 2006, http://www.news.com.au/couriermail/story/0,23739,20961304-5003402,00.html.

[19] Marla McMackin, *Recall Petition Signature Probe Sparks Concern*, Traverse City Record Eagle, Jan. 10, 2004, http://archives.record-eagle.com/2004/jan/10elmpet.htm

2009, *The New York Times* reported that "some donors to groups supporting [Proposition 8] have received death threats and envelopes containing a powdery white substance, and their businesses have been boycotted."[20] The New York Times reported that a new website, called "eightmaps.com" had contributed to the harassment and threats of violence.[21] The site collected names and ZIP codes of people who donated to the ballot measure—information that California collects and makes public under state campaign finance disclosure laws—and overlaid the data on a map.[22]

Visitors could see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. This information was often enough information for interested parties to find more information, such as email address or home address.[23]

B. Petition Signatories Around the World Have Endured Retribution

The experience of those outside of the United States who have sought to express their political views through the petition process further illustrates the critical importance of anonymity to petition

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[20] Brad Stone, *Prop 8 Donor Website Shows Disclosure Law is a 2-Edged Sword*, N.Y. Times, Feb 7, 2009, http://www.nytimes.com/2009/02/08/business/08stream.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

signatories. Beginning in 2003, advocates in Venezuela circulated a petition calling for a referendum to recall the President of Venezuela at the time, Hugo Chavez.[24] More than 2.4 million Venezuelans signed the petition.[25] President Chavez asked Venezuela's National Electoral Council ("CNE") to provide copies of all the petition signatures, ostensibly to expose "mega-fraud."[26] President Chavez also threatened to record "for history" the fingerprints of anyone who signed the referendum.[27] A representative of the ruling party in the legislature, Luis Tascón, led the collection of the signatures, then posted on his website the database of signatures and national identity card numbers.[28] Tascón stated that he posted the database in order to provide a way for people whose names appeared on

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[24] *See* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS 1062-63 (2006).

[25] Tascón List, Wikipedia, http://en.wikipedia.org/wiki/Tasc%C3%B3n_List

[26] *Id.*

[27] Cuidadania Activa, *La Lista: un pueblo bajo sospecha (summary)*, 2006 (showing, at 11:02, President Chavez stating that anyone who signs the Presidential Recall Referendum against Chavez will have to give his fingerprints to be recorded for history), *available at* http://www.youtube.com/watch?v=jS_4TLvphW8.

[28] *See* Helen Murphy, *Chavez's Blacklist of Venezuelan Opposition Intimidates Voters*, Bloomberg, April 17, 2006, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abASIsAyXgoE.

the list, but who had not actually signed the petition, to complain to the CNE.[29]

As a result, many individuals who worked for the government and whose names appeared on the list were fired, denied work, or denied issuance of official documents.[30] The president of the public-sector workers' union, Federación Unitaria Nacional de Empleados Públicos, reported that there were 780 cases of persons negatively affected by political discrimination as a result of the Tascón list.[31] Of this total, 200 were dismissed, 400 were subjected to pressure tactics, and 180 transferred. Tascón later removed the list from his website after widespread complaints that the list was being used to discriminate against the petition signatories.

Incidents like this have occurred worldwide. In China, signatories of a public appeal for human rights and democracy in China faced harsh retaliation by the government.[32] Several prominent signatories of the document, "Charter 08," were detained by the police, and at least 10 other people were questioned in connection with the document.[33]

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[29] *Id.*

[30] *Id.*

[31] Inter-American Commission on Human Rights, *2005 Annual Report* (2005) at Chapter IV, *available at* http://www.cidh.org/annualrep/2005eng/chap.4e.htm.

[32] Human Rights Watch, *China: Retaliation for Signatories of Human Rights Charter*, Dec. 10, 2008, http://www.hrw.org/es/news/2008/12/10/china-retaliation-signatories-rights-charter.

[33] *Id.*

One prominent activist was recently given an 11-year jail sentence.[34]

In Russia, policemen visited and intimidated signatories of documents supporting the candidates of ecological and preservationist groups in the Primorsky district in the northeast of St. Petersburg.[35] The police intimidation was done under the guise of investigating signature fraud, after a political opponent wrote a complaint to the election commission charging that the signatures were false.[36]

In the Gaza Strip, Palestinian leader Yasser Arafat lashed out against dissidents who signed a document blaming him for widespread government corruption.[37] Arafat ordered 11 of the signatories arrested hours after the document was released and urged the parliament to lift the immunity of nine other signatories who were lawmakers.[38] Palestinian lawmakers then decided to censure the dissidents

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[34] Cara Anna, *Chinese Dissident Gets 11 Years for Subversion*, Taiwan News, Dec. 25, 2009, http://www.etaiwannews.com/etn/news_content.php?id=1141369.

[35] Sergey Chernov, *Police Said to Have Intimidated Opposition*, St. Petersburg Times, Feb. 20, 2009, http://www.sptimes.ru/index.php?action_id=100&story_id=28306.

[36] *Id.*

[37] Pittsburgh Post Gazette, *Arafat Foes Refuse to Back Down*, Nov. 30, 1999, http://news.google.com/newspapers?id=2uAdAAAAIBAJ&sjid=h28DAAAAIBAJ&pg=6707%2C10103685.

[38] *Id.*

involved in the petition. One of the dissidents was shot hours later an attack that he said was retaliation for signing the anti-corruption document.[39]

In East Germany, petitions were frequently grounds for political persecution and blacklisting. Stefan Heym, an internationally famous writer, signed the petition protesting the exile of Wolf Biermann, a German dissident and songwriter.[40] From this point on, Heym could only publish his works in the West.[41]

These examples demonstrate the very real risk of political, physical, and professional retaliation that petition signatories face if their names are publicized.

II. The Court Below Wrongly Concluded that Petitioners Did Not Engage in Anonymous Speech

The court below misunderstood the anonymity interest of petitioner and thereby reached an erroneous conclusion. By focusing on the conduct of the individuals exercising their political right to participate in the referendum process rather than on

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[39] Lodi News Sentinel, *Arafat Slaps Aside Corruption Challenge*, Dec. 2, 1999, http://news.google.com/newspapers?id=YOk0AAAAIBAJ&sjid=MSEGAAAAIBAJ&pg=2210%2C4368980.

[40] The Cambridge Encyclopedia, *Stefan Heym - Life, Works, Literature and Links*, Vol. 71, http://encyclopedia.stateuniversity.com/pages/21240/Stefan-Heym.html#ixzz0gf29evNO

[41] *Id.*

the state seeking to compel the disclosure of individual's identities, the court created an impossible standard for an anonymity claim, one that this Court had previously rejected.

A. As the Court Made Clear in McIntyre, Citizens Enjoy a Legal Right to Anonymous Speech Even When Technical Protections Are Imperfect

In *McIntyre v. Ohio*, the Court struck down an Ohio statute that prohibited the distribution of "unsigned documents designed to influence voters in an election."[42] The Court emphasized the value of anonymous speech and noted the close tie to the secret ballot, stating:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of

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[42] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995).

> political rhetoric, where the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. *This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.*[43]

The Court found that "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment," and "[that the] advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded [the speech]."[44] Thus, the Court held that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."[45]

The facts in *McIntyre* are particularly significant in light of the lower court's ruling in this matter. The *McIntyre* court held that Margaret McIntyre's distribution of leaflets to individuals attending a public meeting constituted core, political speech and

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[43] *Id.* at 341-43 (internal quotations omitted) (emphasis added).

[44] *Id.* at 346-47.

[45] *Id.* at 347

that it was anonymous. But as the Court noted, some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS."[46] Thus, the anonymity of speech at issue in *McIntyre* was, as a practical matter, imperfect. She identified herself on some handbills as the author. On others, she did not. The author herself distributed the handbills in public in her local community.[47] It is plausible that these facts could have led an intrepid investigator, or simply a neighbor, to identify Ms. McIntyre despite her attempts to speak anonymously.

However, this Court did not inquire as to the effectiveness of Ms. McIntyre's defenses against identification. Nor did the *McIntyre* court explore the reasonableness of her expectation of privacy. Indeed, the Court acknowledged that Ms. McIntyre's practical anonymity was imperfect—after all, she was identified and prosecuted under the Ohio statute at issue.[48] Yet, the Court focused on the impropriety of *the State's attempt to compel the disclosure of her*

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[46] *Id.* at 337.

[47] *Id.* (noting "McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School," and "Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.").

[48] *Id.* at 352 (noting "as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code.")

identity, and struck down Ohio's attempt to deny citizens their Constitutional right to speak anonymously on matters of public concern.[49]

The court below simply misunderstood the anonymity interest of petitioner in this case. In fact, the logical conclusion of the lower court's anonymity analysis is that no one would be entitled to such a right unless they had constructed a method to ensure perfect anonymity. But of course, there would be no need for a legal claim if the technical method provided the safeguard. Hence, the legal claim necessarily arises in those instances where there is gap between the right to anonymity and technical perfection, and the focus is appropriately on the action of the state that seeks to wrest control over the disclosure of identity.

B. Washington State Traditionally Limited Access to Petition Signatures

Washington State law includes well-established provisions to protect the privacy and anonymity of referendum signatories. The Washington referendum statute is designed to ensure referendum integrity without violating the petition signatories' privacy. The statute strictly limits disclosure, and comparison with similar laws in other states demonstrates that the Washington legislature clearly intended to

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[49] *Id.* at 347, 353, 357 (holding "[w]hen a law burdens core political speech, we apply exacting scrutiny," "Ohio has shown scant cause for inhibiting the leafletting at issue here," and "[o]ne would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.").

protect the privacy of petition signatories and for many years did in fact do so.

The Washington referendum law, passed in 1912, requires submission of petitioners' personal information to the State, but contemplates disclosure for only one purpose: the verification of the petition's legal validity.[50] This disclosure is strictly limited. The verification and canvassing "may be observed by persons representing the advocates and opponents of the proposed measure *so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process* . . . "[51] The Washington legislature was aware of the privacy risk inherent in the verification process, and they addressed that risk by establishing this law.

The limited disclosure method of ensuring referendum integrity while protecting the privacy of petition signatories was a long-standing part of Washington's history with this process, as described by Respondent's own office.[52] According to the official blog of the Washington Office of the Secretary of State,[53] *no petition signatory information was ever*

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[50] Wash. Rev. Code § 29A.72.230 (2009)

[51] *Id.* (emphasis added)

[52] Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blog, Sept. 17, 2009, http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/.

[53] The blog "provides from-the-source information about important state news and public services" and "acts as a bridge between the public and Secretary Sam Reed and his staff." *About this Blog*, Wash. Sec'y of State Blog,

distributed to the public until 2006, in spite of the passage of the Public Records Act in 1972.[54] The Secretary of State attributes this change to "advice by the Attorney General's Office in the 1990s" and to the decreased cost of distribution that has come with the advent of digital records.[55] From the adoption of Washington's ballot initiative law in 1912 to 2006, the practices of the Washington Secretary of State demonstrated that such limited disclosure is a meaningful way of protecting the privacy of petition signatories.

Washington's statutory scheme with respect to verification is unique in that it allows for representatives of petition proponents and opponents to observe the verification.[56] This model includes a bar on disclosure for purposes other than perfection of the referendum process. This framework supports Washington citizens' reasonable expectation that their participation in the referendum process will remain confidential.

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http://blogs.secstate.wa.gov/FromOurCorner/ (last visited Feb. 26, 2010).

[54] A possible exception is the 31-month period between an Attorney General Opinion of March 1953 determining that "such petitions do become public records," Wash. Op. Att'y Gen. 53-55 No. 152 (1953), and a subsequent Opinion on the same question from the same Attorney General determining instead that "to regard such signatures as public records would be contrary to public policy," Wash. Op. Att'y Gen. 55-57 No. 274 (1956).

[55] Zylstra, *supra* note 52.

[56] Wash. Rev. Code § 29A.72.230 (2009).

Comparison with other states' petition verification practices shows the considerations taken by the Washington legislature to both recognize the importance of signature verification and ensure the privacy of petition signatories. Twenty-seven states and the District of Columbia now have implemented their own versions of popular referendum. Of those, twenty-five allow for popular initiative as a means of introducing either legislation or constitutional amendments.[57] Three additional states without popular initiative do still maintain the process referred to as "statute referendum" or "statute veto," which allows petitioners to set a given piece of legislation passed by the legislature to a popular referendum before it may go into force.[58] While the state of Washington allows for popular initiatives as well, Referendum 71 was such a statute referendum.

While each state differs slightly, the process for initiative and referendum is generally the same across the various states that support it. In every case, those supporting the placement of the referendum before the voters of the state must gather a certain number of valid signatures from people who support the referendum's existence.[59] Once the

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[57] Initiative & Referendum Institute at the University of Southern California, State I&R, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Mar. 2, 2010).

[58] Direct Democracy League, States DD Chart, http://www.ddleague-usa.net/statesDD.htm (last visited Mar. 2, 2010).

[59] For a full list of each state's signature requirement, *see* Initiative & Referendum Institute at the University of

signatures have been collected and turned in to the proper body, they must be certified as valid. Three states certify signatures by presuming that they are all valid. Ten states, including Washington, take a random sample and verify the sample against the voter rolls, then calculate the percentage of valid signatures based on the percentage valid within the sample. The remaining twelve states verify each signature.[60]

Of the other states that have ballot initiatives and verification of petition signatures, the overwhelming majority of them make little to no allowance for public participation in the process. Instead, they mainly provide for the secretary of state or county election officials to perform the necessary verification and certification.[61] Some states, such as

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Southern California, Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf.

[60] Initiative & Referendum Institute at the University of Southern California, Comparison of Statewide Initiative Processes 20–22, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf.

[61] *See* Alaska Stat. §15.45.150 (2010); Ariz. Rev. Stat. § 19-121 (LexisNexis 2010); Ark. Code Ann. § 7-9-111(a) (2009); Cal. Elec. Code § 9030 (Deering 2009); Colo. Rev. Stat. §§ 1-40-116, -118 (2009); Fla. Stat. Ann. § 100.371 (LexisNexis 2009); Idaho Code Ann. §§ 34-1802, -1803B

Colorado and Ohio, provide mechanisms by which citizens may challenge the determinations of these officials.[62] In most of these states, the laws contemplate that petition proponents will be challenging an official's decision to exclude a signature, rather than situations in which opponents of a petition seek the full list of signatures to challenge their validity.[63] Indeed, Nevada, the only other state besides Washington to include non-governmental observers to participate in the verification process, the statute only provides that

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(2009); Me. Rev. Stat. Ann. tit. 21A, §§354, 902 (2009); Mass. Gen. Laws ch. 53, § 22A (LexisNexis 2009); Mich. Comp. Laws Serv. § 168.476 (LexisNexis 2010); Miss. Code Ann. § 23-17-21 (2009); Mo. Rev. Stat. §§ 116.120–.121 (2009); Mont. Code Ann. § 13-27-103, -306 (2009); Neb. Rev. Stat. Ann. §§ 32-631 to -632 (2009); Nev. Rev. Stat. Ann. § 293.1277 (LexisNexis 2009); N.D. Cent. Code § 16.1-01-10 (2009); Ohio Rev. Code Ann. §§ 3519.15–.16 (LexisNexis 2010); Okla. Stat. tit. 34, §§ 6.1, 8 (2009); Or. Rev. Stat. § 250.105 (2007); S.D. Codified Laws § 9-20-9 (2009); Wyo. Stat. Ann. § 22-24-114 (2010).

[62] *See, e.g.*, Colo. Rev. Stat. § 1-40-118 (2009); Ohio Rev. Code Ann. § 3519.16 (2010).

[63] *E.g.* Neb. Rev. Stat. § 32-631 (2009) (requiring that Nebraska election officials who find a petition insufficient "shall prepare in writing a certification under seal setting forth the name and address of each signer or circulator found not to be a registered voter and the petition page number and line number where the signature is found.").

the person who submits the petition may observe the verification process, not opponents to the initiative.[64]

III. Signing a Referendum is Similar to Casting a Vote and Should be Protected Accordingly

A. Courts Have Also Recognized that Disregard for Privacy Interests may Unconstitutionally Burden the Right to Vote

In describing the fundamental right to vote, the Supreme Court has stated, "no right is more precious in a free country than that of having a voice in the election of those who make the laws, under which, as good citizens we must live."[65] Although states may impose certain qualifications and regulations on this right, any restriction must promote a compelling state interest, and must be narrowly tailored to serve that interest.[66] Courts have found that certain requirements impinging on privacy rights unconstitutionally burden the fundamental right to vote.

In *Greidinger v. Davis*,[67] the Fourth Circuit found that requiring disclosure of a social security

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[64] Nev. Rev. Stat. § 293.1277 (2009). The statute does allow for the subject of a recall petition to observe the verification process as well, but in that special case the subject is a government actor.

[65] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1976).

[66] *Hill v. Stone*, 421 U.S. 289, 297 (1975).

[67] 988 F.2d 1344 (4th Cir. 1993).

number ("SSN") obtained from voter registration applications in the public voting rolls impermissibly burdened the right to vote. Under the Constitution of Virginia, all citizens qualified to vote were required to provide their SSN on their voter registration application, which was subject to public inspection in the Office of the General Registrar and provided, upon request, as part of voter registration lists.[68] The number was used to help maintain the accuracy of voter registration records but was also made public by the state in the voting rolls, where it was displayed next to the voter's name and address.

On July 24, 1991, Marc Alan Greidinger completed an application, but omitted his social security number, and as a result was denied the ability to register to vote.[69] Greidinger filed suit against Robert H. Davis, his local registrar, and other members of the Virginia State Board of Elections, alleging "to the extent Virginia authorizes the collection and publication of SSNs for voter registration, it unconstitutionally burdens his right to vote."[70] The Fourth Circuit, in accordance with *Evans v. Cornman*[71] and *Hill v. Stone*,[72] applied strict

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[68] VA. CONST. art II, § 2.

[69] *Greidinger*, 988 F.2d at 1345.

[70] *Id.* at 1346.

[71] 398 U.S. 419, 422 (1970) ("Before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interest served by it must meet close constitutional scrutiny.").

[72] 421 U.S. 289, 297 (1975) ("[A]s long as the election in question is not one of special interest, any classification

scrutiny analysis to this question of voter qualification and ballot access. Citing the Privacy Act and the Freedom of Information Act, which both contain provisions exempting SSNs from disclosure in certain circumstances, and potential harms that can result from dissemination of one's SSN, the court concluded, "The statutes at issue compel a would-be voter in Virginia to consent to the possibility of a profound invasion of privacy when exercising the fundamental right to vote," and as such, constituted a substantial burden on Greidinger's right to vote.[73]

The court also found that the Virginia laws mandating disclosure of SSNs on the voter registration application were not narrowly tailored to the state's asserted interest of preventing voter fraud: "the fact that the SSN may be potentially disseminated to any registered voter or political party with the attendant possibility of a serious invasion of one's privacy is demonstrably more restrictive than predicating the right to vote on the simple receipt and internal use of the SSN."[74] Therefore, because the Virginia laws conditioned voter registration on public disclosure of SSN, the provisions were invalid as imposing a substantial burden on would-be voters that was not narrowly tailored to the state's purpose of preventing voter fraud.

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restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.")

[73] *Greidinger*, 988 F.2d at 1354.

[74] *Id.* at 1352.

Greidinger demonstrates that there are Constitutionally impermissible privacy burdens when the state chooses to publish information individuals have provided to the state so that they may participate in the political process.

B. In Open Government Cases, Courts Have Recognized Fundamental Privacy Rights

The Freedom of Information Act[75] ("FOIA") and state open records laws exist for the purpose of "open[ing] agency action to the light of public scrutiny."[76] Mandatory disclosure of government records, however, is subject to several exemptions, including the personal privacy exemption.[77] In determining what types of information fall within the scope of this exemption, courts balance the privacy interests of the individual against the public's interest in disclosure of the information.[78] Courts have found that because of the strong privacy rights implicated when signing politically-charged petitions,

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[75] 5 U.S.C. § 552, as amended by Pub. L. 104-231, 110 Stat. 3048 (1996)

[76] *Dep't of Air Force v. Rose*, 425 U S. 352, 372 (1976).

[77] Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1994) (FOIA disclosure "does not apply to matters that are . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). *see also* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 167-207 (Harry A. Hammit et al. eds., 2008).

[78] *See Rose*, 425 U S at 372.

such petitions fall under the personal privacy exemption of the Freedom of Information Act.

In *Campaign for Family Farms v. Glickman*,[79] the Eighth Circuit found that mandatory disclosure of the names, addresses, and related information of petition signatories was prohibited because the "substantial privacy interest in a secret ballot . . . overrides whatever public interest there may be in the oversight of the verification process."[80] In *Glickman*, a family farm and community membership group, the Campaign, organized a petition to require the United States Department of Agriculture ("USDA") to call a referendum on a program requiring pork producers and importers to pay an assessment, or check-off, to the National Pork Board on every sale or import of pork products.[81] The Campaign submitted a petition to the USDA containing over 19,000 signatures, which became the subject of a FOIA request by The Council, the National Pork Board's general contractor.[82] The USDA determined the information did not fall under FOIA's personal privacy exemption, and the Campaign, along with individual pork producers, filed a reverse FOIA action, which was the subject of the Eighth Circuit appeal, to prohibit disclosure of the records.[83]

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[79] 200 F 3d 1180 (8th Cir. 2000).

[80] *Id.* at 1189.

[81] *Id.* at 1182-83.

[82] *Id.*

[83] *Id.* at 1184-85.

In ruling that the petition did fall under the personal privacy exemption of the FOIA, the Eighth Circuit likened signing a petition to voting with a secret ballot: "to make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners' privacy interest in a secret ballot."[84] Citing *Burson v. Freeman*[85] and *McIntyre v. Ohio Elections Comm'n*[86] as examples, the court stated that the "secret ballot is of paramount importance to our system of voting."[87] The Eighth Circuit held:

> While we need not decide whether there is a constitutional right to a secret ballot, we do not hesitate to hold that there is a strong and clearly established privacy interest in a secret ballot and that this privacy interest is no less compelling in the context of FOIA's personal

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[84] *Id.* at 1187.

[85] 504 U.S. 191 (1992).

[86] 514 U.S. 334 (1995).

[87] *Glickman*, 200 F.3d at 1187-88. *See Burson*, 504 U.S. at 206 ("[A]ll 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments . . . demonstrat[ing] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud."). *See also McIntyre*, 514 U.S. at 343 ("[T]he secret ballot [is] the hard-won right to vote one's conscience without fear of retaliation.").

privacy exemption than it is in other contexts.[88]

As such, the balancing test clearly favors protecting the privacy of the signatories of the petition, and mandatory disclosure of information relating to the signatories could not be compelled under FOIA.[89]

A subsequent district court decision followed the reasoning in *Glickman* in order to protect from mandatory FOIA disclosure the names and telephone numbers of attendees who were listed on a sign-in sheet for a meeting with Immigration and Naturalization Services ("INS").[90] According to the court, its decision to protect such information from public disclosure was supported by FOIA's exemption six, the Supreme Court's decisions in *United States Dep't of Defense v. FLRA*[91] and *United States Dep't of State v. Ray*,[92] and the 8th Circuit in *Glickman*.[93]

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[88] *Id.* at 1188.

[89] *Id.* at 1189.

[90] *Judicial Watch v. Reno*, 2001 U.S. Dist. LEXIS 25318 (D.D.C. 2001).

[91] 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.").

[92] 502 U.S. 164, 179 (1991) ("Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.").

[93] *Judicial Watch*, at 20-21

The court in *Howard Johnson Co., Inc. v. NLRB*[94] likened authorization cards to a secret ballot, finding that such cards contained personal information about the interest of employees in union representation. As in *Glickman*, the court found submission of a name in the context of a controversial matter implicated strong privacy rights warranting an exemption to the mandatory disclosure provisions of FOIA. The court held, "The privacy which attaches to an employee's interest in union representation approaches that which surrounds the secret ballot in an election. . . . Such a finding of a right of privacy in the authorization cards does not stretch the application of exemption 6 or 7(C) [of the FOIA] beyond that intended by Congress."[95]

Courts have also considered the right to personal security in examining privacy in a FOIA context. The Substantive Due Process Clause of the Constitution recognizes two types of privacy rights: the right of an individual to make personal decisions relating to family relationships and child rearing,[96] and the right of an individual to avoid disclosure of personal matters.[97] The latter, referred to as an informational privacy right, has been recognized by courts in two instances: "(1) where the release of personal information could lead to bodily harm, and (2) where the information released was of a sexual, personal,

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[94] 1977 U.S. Dist. LEXIS 15881 (W.D N.Y 1977).

[95] *Id.* at *7.

[96] *See Lawrence v. Texas*, 539 U.S. 558 (2003).

[97] *Whalen v. Roe*, 429 U.S. 589 (1977).

and humiliating nature."[98] In *Kallstrom v. City of Columbus*,[99] the Sixth Circuit considered whether undercover police officers had a privacy interest "of constitutional dimension" in information contained in their personnel files, such that the information would be shielded from disclosure in spite of Ohio's Public Records Act.

The plaintiffs in *Kallstrom* were undercover police officers involved in a drug trafficking investigation relating to a violent gang in Columbus, Ohio.[100] The plaintiffs testified in *United States v. Derrick Russell, et al.*, against eight of the gang members who were prosecuted on drug conspiracy charges.[101] The defense counsel in *Russell* requested and obtained from the City of Columbus, in accordance with Ohio's Public Records Act,[102] the personnel and pre-employment records of the police officers, which included names and addresses of the officers and their immediate family members. The officers brought suit against the City of Columbus, alleging that disclosure of information contained in their personnel files violated their right to privacy guaranteed by the Due Process Clause of the

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[98] *Lambert v. Hartman*, 517 F.3d 433, 440-41 (6th Cir. 2008).

[99] 136 F.3d 1055 (6th Cir. 1998).

[100] *Id.* at 1059.

[101] *Id.*

[102] Ohio Rev. Code. Ann § 149.43(A)(1)(h) (LexisNexis 2010).

Constitution, and placed them and their family members at risk for their safety.[103]

The Sixth Circuit acknowledged the important interest set out in the Public Records Act, but the court found the police officers had a fundamental liberty interest, recognized by the Supreme Court, to be free from "unjustified intrusions on personal security."[104] Because disclosure of the records implicated a fundamental right to privacy and personal security and was not narrowly tailored to serve the interest of informing the public as to the functions of Ohio's law enforcement agency, the court found the City was liable to the officers for damages under 42 U.S.C. § 1983, and afforded the officers injunctive relief prohibiting the City from disclosing such information in the future without providing the officers with meaningful notice.[105]

In 2001, the Sixth Circuit applied the reasoning in *Kallstrom* to Tennesee's Open Records Act.[106] In that case, Tennessee had passed an ordinance imposing licensing requirements on adult entertainment businesses, and requiring the disclosure of information for the purpose of

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[103] *Kallstrom*, 136 F.3d at 1060

[104] *Id.* (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

[105] *Id.* at 1069-70.

[106] *See Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F 3d 377 (6th Cir. 2001).

conducting background checks.[107] Plaintiffs challenged these disclosure provisions on constitutional grounds, alleging that the provisions posed more than an "incidental burden on First Amendment freedoms." The burden was greater than was necessary to further the government's interest, because members of the public with illicit motives could compel disclosure of such information under Tennessee's Open Records Act.[108] The court found that the disclosure requirements were not unconstitutional, because under *Kallstrom*, such information was exempt from Tennessee's Open Records Act:

> Applying *Kallstrom*'s reasoning to this context, we find that all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal.[109]

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[107] *Id.* at 375-86, 393.

[108] *Id.* at 394-95.

[109] *Id.* at 395.

More recently, a district court in Tennessee similarly found that while identifying information may be included on an entertainer's permit, a provision requiring the entertainer to present the permit to a "customer" upon request was invalid, because such private information was exempt from Tennessee's Open Records Act.[110]

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[110] *Below v. Giles County Adult-Oriented Establishment Bd.*, 2005 U.S. Dist. LEXIS 46996, *72-73 (M.D. Tenn Sept. 29, 2005).

CONCLUSION

Amici respectfully request this Court to grant Petitioners' motion to reverse the decision of the lower court.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

JOHN DOE #1, *ET AL.*,
Petitioners,
v.
SAM REED, WASHINGTON SECRETARY OF STATE, *ET AL.*
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, INC., FREE SPEECH COALITION, INC., UNITED STATES JUSTICE FOUNDATION, CITIZENS UNITED, NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., INSTITUTE ON THE CONSTITUTION, DOWNSIZE DC FOUNDATION, GUN OWNERS FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, *ET AL.* IN SUPPORT OF PETITIONERS

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U.S. Border Control
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U.S. Justice Foundation
Young America's Foundation

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INTEREST OF *AMICI CURIAE*

These *amici curiae* form a coalition of interested nonprofit and for profit corporations committed to the proper construction of the Constitution and laws of the United States. Most of these *amici* have filed *amicus curiae* and/or party litigant briefs in the past in cases before federal courts, including this Court.[1]

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[1] It is hereby certified that the parties have consented to the filing of this brief, that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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- English First (www.englishfirst.org)
- Gun Owners of America, Inc. (www.gunowners.org)
- Law Enforcement Alliance of America, Inc. (www.leaa.org)
- Public Advocate of the United States (www.publicadvocateusa.org)
- 60 Plus Association (www.60plus.org)
- U.S. Border Control (www.usbc.org)

The following *amicus curiae* is a national political party:

- The Constitution Party National Committee (www.constitutionparty.com)

The remaining *amici curiae* are for profit companies which assist nonprofit organizations in developing and implementing outreach programs for the public:

- American Target Advertising, Inc.
- ClearWord Communications Group, Inc. (www.clearword.net)
- Eberle & Associates, Inc. (www.eberleassociates.com)
- Production Solutions, Inc. (www.productionsolutions.com)
- The Richard Norman Company (www.richardnorman.com)

The *amici curiae* believe that their brief will be of assistance to the Court, bringing to its attention relevant matter concerning the application of the republican form of government guarantee found in Article IV, section 4 of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the principle of anonymity not fully addressed by the parties.

SUMMARY OF ARGUMENT

Pointing to the Washington State referendum process as "legislative" in nature, respondents deny that protected speech interests would be infringed by the forced public disclosure of the names and addresses of referendum petition signers. But freedom of speech is no stranger to the legislative process, taking form in the Speech and Debate clause of the United States Constitution, and in state constitutions, freeing legislators from oversight by the other two branches of government. Failure to apply this freedom that forbids Washington State's public disclosure of referendum petition signers would threaten the integrity of the legislative process.

The case of a state referendum presents a situation somewhat different from certain other cases, such as Buckley v. American Constitutional Law Foundation, McIntyre v. Ohio Elections Commission, and Meyer v. Grant, where this Court has applied its Fourteenth Amendment due process incorporation doctrine to impose the First Amendment's freedom of speech upon the states. Here, the First Amendment is being applied to those engaged in exercising a state legislative power. Such application is supported because freedom of speech in the legislative process is part of the protection afforded to every state under the guarantee of a republican form of government, set forth in Article IV, section 4, of the U.S. Constitution. As a constitutionally-protected right applicable to the states, it is a protected privilege and immunity of U.S. citizenship under the Fourteenth Amendment.

As this case involves an application of the constitutional anonymity principle in a new area — state referendum petition signers — the Court's ruling should be informed by an understanding of the breadth and purposes of the anonymity principle. The anonymity right is found in the First Amendment's freedoms of the press and assembly and association. It has broad application to those who would exercise their rights as sovereign people, including participation in elections and legislation by secret ballot. The anonymity principle is a bulwark against the Washington Secretary of State's unwarranted action to place the names and addresses of Referendum 71 petition signers into the public domain.

ARGUMENT

I. FREEDOM OF SPEECH PRINCIPLES APPLY TO THE WASHINGTON REFERENDUM 71 PROCESS.

By Article II, section 1 of the Washington State Constitution (hereinafter "Wash. Const."), "the people" have "vested" the state's legislative authority in "a senate and house of representatives," while "reserv[ing] to themselves the power ... to approve or reject at the polls any act, item, or part of any bill, act, or law passed by the legislature." In order to exercise this referendum power, section 1(b) requires the filing of a petition containing the "valid signatures ... equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state." *See also* Revised Code of Washington (hereinafter "RCW") § 29A.72.150. After official verification of a sufficient number of valid signatures, the referendum measure is submitted to a vote by secret ballot at the next general election. *See* RCW § 29A.72.250.

"'A **referendum** ... is an exercise of the reserved power of the people to **legislate**....'" State *ex rel.* Heavey v. Murphy, 982 P.2d 611, 615 (Wash. 1999) (emphasis added). In the court below, the State contended that because a referendum is "a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution," the signing of a referendum petition is not "speech," and therefore, a petition signer

has no right to the freedom of speech secured by the Constitution. Doe #1 v. Reed, 586 F.3d 671, 677 n.9 (9th Cir. 2009). The State is mistaken. As the Washington Supreme Court has ruled, "the people in their legislative capacity remain subject to the mandates of the Constitution." Belas v. Kiga, 959 P.2d 1037, 1040-41 (Wash. 1998).[2]

The freedom of speech is no stranger to the legislative process. To the contrary. The freedom of speech was first constitutionally secured to the people's elected legislative representatives, not to the people themselves. Section 9 of the 1689 English Bill of Rights provided "[t]hat the freedom of speech ... in parliament, ought not to be impeached or questioned in any court or place out of parliament." Sources of Our Liberties ("Sources"), p. 247 (R. Perry & J. Cooper, eds., American Bar Foundation: Rev. Ed., 1978). Long the subject of contention between the Parliament and the Tudor and Stuart kings, this hard-earned freedom became "'indispensable and universally acknowledged." *See* Kilbourne v. Thompson, 103 U.S. 168, 202 (1881). Thus, the 1689 Bill of Rights simply "confirmed the principles for which the Commons had been struggling by its declaration that speeches and debates in Parliament could not be brought into question outside that body." Sources at 235.

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[2] "While the **power** of direct legislation is reserved to the people in the constitution itself, the **exercise of that power** is subject to other pertinent constitutional provisions." *See* P. Trautman, "Initiative and Referendum in Washington: A Survey," 49 *Wash. L. Rev.* 55, 70-71 (1973) (emphasis added).

In America, in several state constitutions and the federal bill of rights, the people took the freedom of speech one step further, securing it to themselves. *See, e.g.*, Article XII, Constitution of Pennsylvania (1776) (reprinted in Sources, p. 330), and First Amendment, United States Constitution (1791) (reprinted in Sources, p. 432). As James Madison explained:

> In the United States, [t]he people, not the government, possess the absolute sovereignty.... Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. [IV The Debates in the Several State Conventions, pp. 369-70 (1866) (reprinted in Sources, p. 426.]

Even though America's founders secured the freedom of speech to the people, they did not by that act withdraw that freedom from the people's elected legislative representatives. Rather, the "great and vital [legislative] privilege [of] the freedom of speech and debate," as Joseph Story described it, "was in full exercise in our colonial legislatures, and now belongs to the legislature in **every State** in the Union as a constitutional right." 1 J. Story, Commentaries on the Constitution, § 866, p. 630 (5th ed. 1891) (emphasis added). Envisioned in America as a necessary corollary to protecting the liberties of the people, the 1780 Constitution for the Commonwealth of Massachusetts stated:

> The freedom of ... speech ... in either house of the legislature is **so essential to the rights of the people**, that it cannot be the foundation of

> **any** accusation or prosecution, **action** or complaint, in any other court or place whatsoever." [Article XXI, Constitution of Massachusetts (Oct. 25, 1780), reprinted in Sources, p. 377 (emphasis added).]

Prior to the adoption of the First Amendment, constitutional security for the freedom of speech took form in Article I, section 6, of the United States Constitution, which provides that "for any speech or debate in either House," Senators and Representatives "shall not be questioned in any other Place." As the Supreme Court ruled in 1972:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government **wide freedom of speech**, debate, and deliberation **without intimidation or threats from the Executive Branch**. [United States v. Gravel, 408 U.S. 606, 616 (1972) (emphasis added).]

Refusing to "take a literalistic approach in applying the privilege," the Supreme Court's "consistent approach" has been "to implement [the Clause's] fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.*, 408 U.S. at 617-18. In short, the freedom of speech secured to persons acting in their legislative capacity is an essential feature of the separation of powers, protecting persons exercising legislative power from executive actions "that directly impinge upon or threaten the legislative process." *Id.*, 408 U.S. at 616.

In this case, the Washington Secretary of State, a member of the state's executive branch,[3] has exercised his powers in a way that would both "impinge" and "threaten" the legislative process initiated by Referendum 71. Construing the state's Public Records Act (hereinafter "PRA") to require public disclosure of Referendum 71 petitions, the Secretary announced his intention to honor the request to provide such petitions to two organizations that "stated publicly that they intended to place the names and addresses of R-71 petition signers on the Internet to encourage 'uncomfortable conversations.'" *See* Petitioners' Brief, pp. 8-9. In anticipation of such confrontations, RCW § 29A.72.130 — the statute establishing the "form" of a referendum petition — also provides protection for the circulator of that petition, stating that "RCW § 9A.46.020 applies to any conduct constituting harassment against a petition signature **gatherer**." (Emphasis added.) RCW § 9A.46.020 would permit any opponent of a referendum petition to "confront" the "signature gatherer" so long as the opponent did not "knowingly" threaten bodily injury, physical property damage, confinement, or any other like threat.

After signatures have been gathered, however, Washington State statutes place severe restrictions on access to the petitions, limiting the number of persons allowed to view the signers' names, addresses and other vital information, forbidding the copying of the petitions, and focusing the view of the petitions to

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[3] Article III, section 1, Wash. Const.

determine only their validity and numerical sufficiency. *See* RCW § 29A.72.230. Should a dispute remain after the secretary-supervised review, then the petitions may be reviewed in the state courts for the sole purpose of ascertaining whether the "referendum petition contains or does not contain the requisite number of signatures of legal voters...." RCW § 29A.72.240.

"[D]epart[ing] from nearly 70 years of precedent ... that petitions are not public records subject to disclosure,"[4] the Secretary of State has unconstitutionally elected to use his executive power to put the names, addresses and other information contained in the referendum petitions into the hands of persons who would place that information on the Internet for the purpose of confronting the petition signers — a confrontation that would occur completely **outside** the petition process, and hence, totally outside the legislative process. By such action, the Secretary has misused his executive power, placing each signer in jeopardy of being "questioned" outside the "place" of his exercise of legislative power, thereby "threaten[ing] to control his conduct as a legislator." *See* Gravel, 408 U.S. at 618. As applied to the petition signers' exercise of legislative power, the freedom of speech protects the signers from such executive oversight as "directly impinge[s] upon or threaten[s] the legislative process." *Id.*, 408 U.S. at 616.

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[4] Petitioners' Brief, p. 9 n.18.

II. THE FREEDOM OF SPEECH GUARANTEED BY THE FIRST AMENDMENT APPLIES TO STATE REFERENDUM PROCESSES.

This is not the ordinary case wherein this Court may, without hesitation, apply its Fourteenth Amendment incorporation doctrine to impose the First Amendment's guarantee of freedom of speech upon the states, as it did in the closely-analogous cases of Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), and Meyer v. Grant, 486 U.S. 414 (1988). In each of those cases, this Court identified the activity at issue to be individual "political discourse" in relation to a political campaign. *See* Meyer, 486 U.S. at 421-24; McIntyre, 514 U.S. at 336-38; Buckley, 525 U.S. at 201-04. None, however, involved activity that, itself, was the exercise of state governmental power, giving rise to the State's argument here that its referendum process by which state legislative power is exercised is immune from First Amendment standards. *See* Doe #1, 586 F.3d at 677 n.9.

The Ohio law at issue in McIntyre "prohibite[d] the distribution of anonymous campaign literature." Although the question before the Court concerned the constitutionality of that law as applied to the distribution of leaflets opposing "an imminent referendum on a proposed school tax levy," Mrs. McIntyre's actions were totally unrelated to the referendum process itself. *See* McIntyre, 514 U.S. at 336-37. Although Meyer and Buckley addressed the

constitutionality of Colorado statutes governing the state's initiative process, the subjects of both cases were laws applying to the petition "circulators," who, like Mrs. McIntyre, were not exercising legislative power. *See* Meyer, 486 U.S. at 421 ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."); Buckley, 525 U.S. at 192 ("[A]s in Meyer, the restrictions in question significantly inhibit communication with voters about proposed political change....").

In this case, however, petitioners are persons who signed the Referendum 71 petition, and according to that act helped forward the petition on a course that, by state constitutional design, is a process by which laws are enacted in the State of Washington. *See* Wash. Const., Article II, §§ 1(b) and 1(c). At stake in this case, then, is whether the referendum process is such an integral part of the polity constituted by the citizens of the State of Washington for the governance of one of the fifty independent and sovereign states in the federal union that the First Amendment guarantee of the freedom of speech does not apply, as the State has argued (*see* Doe #1, 586 F.3d at 677 n.9); or whether the First Amendment guarantee of the freedom of speech extends even to the state referendum process.

As pointed out in Part I of this Argument, the freedom of speech establishes a jurisdictional barrier between a person who is exercising a legislative function and a person who is exercising executive

power, if the latter exercise threatens "the integrity or independence" of the legislative process. *See* Gravel, 403 U.S. at 625. In this case, the very purpose of the state's PRA is to force disclosure of information in the custody of the government to "**maintain control over the instruments** that they have created." *See* RCW § 42.56.030 (emphasis added). As applied here, the Secretary of State has made a decision to release to the public certain records to enable Referendum 71 opponents to confront referendum signers, exercising control over the signers by questioning them in a "place" outside the legislative verification process provided in RCW §§ 29A.72.230-29A.72.250.

As the petitioners have so ably argued, by extending the state's PRA to the names and addresses of the signers of the Referendum 71 petition, the Secretary of State has broken down the jurisdictional door, subjecting the petition signers to the twin threats of "'violence and insidious corruption,'"[5] the "two great natural and historical enemies of all **republics.**" Petitioners' Brief, pp. 14-15, 22-23 (emphasis added). While Ex Parte Yarbrough, 110 U.S. 651, 663 (1884), relied upon by petitioners, concerned a threat posed to the "general government" and, "the proper discharge of the great function of legislating for that government" — and therefore, the constitutional power of Congress to protect the national republic — the principles stated therein are equally applicable to the states under the Article IV, section 4 "guarantee to every State in the Union a Republican Form of Government."

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[5] *See* Petitioners' Brief, pp. 2-12.

As William Rawle observed in the early nineteenth century, the Article IV, section 4 guarantee made each state's form of government a matter of national concern:

> The Union is an association of the people of republics; its preservation is calculated to depend on the preservation of those republics. The people of each pledge themselves to preserve that form of government in all. [W. Rawle, A View of the Constitution of the United States (hereinafter "Const. View") (2d ed. 1829), as reprinted in 4 The Founders' Constitution, p. 571 (Kurland, P. & Lerner, R., eds., Univ. of Chi. Press: 1987).]

The guarantee of a republican form of government was considered to be the "corner stone of the [people's] liberties." *See* St. G. Tucker, View of the Constitution of the United States, p. 302 (Liberty Fund, Indianapolis: 1999). *See also* The Federalist No. 43, pp. 225-26 (Carey, G. & McClellan, J., eds.: Liberty Fund: 2001). As Joseph Story asserted, without the Guaranty Clause, a "successful faction might erect a tyranny on the ruins of order and law" that would "trample upon the liberties of the people." 3 J. Story, Commentaries on the Constitution, § 1814, p. 594 (5th ed. 1891). Indeed, the founders' commitment — that the right of the people to determine how they will be governed — was so strong, and their fear of the monarchical spirit so great that it overcame any doubts about conferring upon the federal government the power to ensure that each state would have and retain a republican form of government. *See* "Records

of the Federal Convention," reprinted in 4 The Founders' Constitution at 559-560. *See also* W. Rawle, Const. View, reprinted in 4 The Founders' Constitution at 572.

At the very heart of the fight for the freedom of speech in the English Parliament was the issue of civil sovereignty. Queen Elizabeth I and King James I claimed that the parliamentary privilege of free debate existed by the grace of the crown, the nation's sovereignty residing in the person of the queen or the king. Thus, members of Parliament could be forced to give an account of their views to the supreme executive power. *See* Sources at 234-35. With the restoration of the monarchy in the Glorious Revolution of 1688, the Bill of Rights divested the monarchy of its sovereign claims over the speeches and debates of the people's elected representatives in Parliament. *Id.* So central was this divestiture of sovereignty that Blackstone could write in his 1765 Commentaries that "this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament." I W. Blackstone, Commentaries on the Laws of England, p. 160 (Univ. of Chi., Facsimile ed: 1765).

As Joseph Story observed in his Commentaries, the freedom of speech in the exercise of legislative power in the Mother Country — being a "claim of immemorial right" — gave birth to its being secured "to the legislature of every State in the Union." 1 Joseph Story's Commentaries, p. 630. In his "Lectures on Law," James Wilson summarized the prominent place occupied by this great freedom:

> The liberal provision, which is made, by our constitutions, upon this subject, may be justly viewed as a very considerable improvement in the science and the practice of government. [J. Wilson, "Lectures on Law," reprinted in 2 The Founders' Constitution, p. 331.]

With "such a great cloud of witnesses,"[6] there can be no doubt that the freedom of speech — secured to the English parliamentarians, the colonial legislatures, the original state legislatures, and the United States Congress — would be part of the woof and warp of the republican form of government secured to the states by Article IV, section 4. It would be a mistake, however, to view this freedom as an institutional guarantee. Rather, as Chief Justice Parsons wrote of the article of the Massachusetts Constitution guaranteeing freedom of speech in "either house of the legislature":

> In considering this article, it appears to me that the privilege secured by it is not so much the **privilege** of the house as an organiz[ed] body, as of each individual member composing it .... For he does not hold this **privilege** at the pleasure of the house; but derives it from the will of the people, expressed in the constitution.... [Coffin v. Coffin, 4 Mass. 1 (1803), reprinted in 2 The Founders' Constitution at 338 (emphasis added).]

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[6] Hebrews 12:1 (KJV).

When the petitioners in this case signed the Referendum 71 petition, they did so in their capacity as citizens of the state. Their Washington citizenship, however, is secondary, made possible by their first being citizens of the United States. *See* Fourteenth Amendment, section 1, U.S. Constitution. As dual citizens, petitioners have "two political capacities ... each protected from incursion by the other." U.S. Terms Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). As American citizens, petitioners have certain privileges and immunities that attach to their national citizenship that cannot be abridged by the state. One of those privileges is the guarantee that the state government in which he, a U.S. citizen, resides is republican in form. As demonstrated above, that government, republican in form, would guarantee to the individual, freedom of speech in the exercise of legislative power.[7] As James Wilson observed:

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[7] Although the general principles of a republican form of government have consistently been ruled by this Court as "political questions," such rulings do not preclude this Court from adjudicating claims of right anchored in specific individual guarantees, such as the freedom of speech as asserted in this case by Petitioners. Certain "republican form" claims may not be judicially enforceable, such as the allocation of political power within a state (*see* Pacific States v. Oregon, 223 U.S. 118 (1912)), or the recognition of a State's "lawful government" (Luther v. Borden, 48 U.S. (7 How.) 1 (1849)). There are, however, other privileges and immunities of a republican form that are matters of enduring principle for which there are "judicially discoverable and manageable standards." *See* Baker v. Carr, 369 U.S. 186, 216 (1962). This case is one of them.

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is **indispensably necessary**, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense. [J. Wilson, "Lectures on Law," reprinted in The Founders' Constitution, p. 331 (emphasis added).]

By forcibly placing petitioners' names and addresses into the public domain, the Washington Secretary of State would rob petitioners of this personal liberty. Applying the First Amendment principle of anonymity, however, would protect it.

III. FORCED DISCLOSURE VIOLATES THE TIME-HONORED RULE OF ANONYMITY WHICH PROTECTS THE CIVIL SOVEREIGNTY OF THE PEOPLE.

The instant case involves application of a time-honored attribute of a republican form of government — the right to political anonymity. Here, the right to anonymity is being invoked in a new context — to protect against the disclosure of the identities of signers of a petition to put a referendum on a state ballot. By a brief review of how the right to anonymity protects a sovereign people from the tyranny of both the government and the mob, these *amici* seek to

assist the Court in making an informed and principled decision in this new area.

The American principle of anonymity developed into a standard quite different from anything that existed in England. Where sovereignty is vested in a monarch, the government can be expected to assert the power and right to know everything that happens in the society which could undermine the government. Of particular interest to monarchs is the identity of those subjects who would dare to criticize their government. In Talley v. California, 362 U.S. 60 (1960), Justice Black recounted the manner in which the English system suppressed dissent by forcing dissenters to reveal their identities:

> The obnoxious **press licensing law** of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old **seditious libel cases** in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.... Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. [*Id.*, 362 U.S. at 64-65 (emphasis added).]

Freed from the English monarch, sovereignty in the United States has always been vested in the people.

The right to govern is not divinely conferred; rather, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Declaration of Independence. Government officials serve — they do not rule. Government officials do not embody the government — they only are loaned the reins of government for a season.

In a constitutional republic, anonymity protects the people's full participation in the people's business, because the people are the principals and the government officials are their agents and representatives. Anonymity has a rich heritage from the founding era onward, as revealed by a short excerpt of that history, as told by Justice Stevens:

> That [anonymity] tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms. [McIntyre v. Ohio Elections Commission, 514 U.S. 334, 343 n.6.]

The American principle of anonymity, restricting what government officials can force us to reveal about our activities to them or to others, is constitutionally grounded in First Amendment freedoms of press and association. Its application ranges from pamphlets to television ads, from grassroots lobbying to memberships in voluntary societies, from public policy litigation to the process by which we select our government officials. And, as to the states, it is also grounded in the federal constitutional guarantee of a

republican form of government and the privileges and immunities guarantee of the Fourteenth Amendment, where it protects the people of Washington as they exercise their right to legislate under state law.

A. Guaranteed Anonymous Entry and Participation in the Marketplace of Ideas

The story of the First Amendment's press guarantee has been researched, retold, and applied repeatedly by this Court in numerous recent cases[8] but still one should never lose sight of its central place in a government that is republican in form. In his classic statement of the guarantee, Sir William Blackstone averred: "The liberty of the press is indeed essential to the nature of a free state." IV Blackstone's Commentaries at 151. Thus, Blackstone confidently asserted: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id.* at 151-52.

Among the "sentiments" that such a freeman had a "right" to disclose to, or withhold from, the "public" was his true identity. So long as the king controlled the press by the exercise of a power to require a man to obtain a license before he could communicate his sentiments to the public, however, he had to disclose his identity to the king. Thus, in the first instance, the liberty of the press consisted in denying to the

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[8] *See, e.g.*, McIntyre v. Ohio Elections Commission, 514 U.S. at 358-72 (Thomas, J., concurring)

government the power of "laying no *previous* restraints upon publications." *Id.* at 151 (italics original).

1. No Compelled Identification to the Government

In 1938, this Court held "invalid on its face" a city ordinance requiring a person before distributing any written "literature of any kind ... without first obtaining written permission from the City Manager of the City of Griffin [Georgia]." Lovell v. Griffin, 303 U.S. 444, 447 (1938). Refusing to consider the purported interests of the city to maintain "public order," or "littering," the Court found that the very "character" of the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451. Sixty-four years later, in Watchtower v. Village of Stratton, 536 U.S. 150 (2002), the Court struck down another municipal ordinance that required one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name. Justice Stevens explained:

> [i]t is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. [*Id.* at 166.]

In short, by its no-licensing rule, the freedom of press prohibits the government from requiring a person to

identify himself to government before entering the marketplace of ideas, because every freeman has the right of self-censorship, free from the heavy hand of a government-imposed licensing system.

2. No Compelled Identification to the Public

In Talley v. California, 362 U.S. 60 (1960), the Court struck down a Los Angeles City ordinance requiring those who disseminate hand-bills to state, on their face, the identity of those who printed, wrote, compiled, manufactured, and distributed them. Justice Black explained the Court's concern:

> There can be no doubt that such an **identification requirement** would tend to restrict freedom to distribute information and thereby restrict freedom of expression....
>
> **Anonymous** pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either **anonymously** or not at all.... Even the Federalist Papers ... were published under **fictitious names**. It is plain that **anonymity** has sometimes been assumed for the most constructive purposes. [*Id.* at 64-65 (emphasis added).]

Thirty-five years later, in McIntyre v. Ohio Elections Commission, the Court struck down an Ohio election statute which prohibited distribution of political

campaign literature not containing the name and address of the person or campaign official issuing the literature. Justice Stevens explained:

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an **author's decision to remain anonymous**, like other decisions concerning omissions or additions to the content of a publication, is ... protected by the First Amendment. [*Id.* at 342 (emphasis added).]

The McIntyre rule protects the sovereignty of the individual against forced disclosure of his identity even if the purpose of the disclosure requirement is to make the market participant accountable to one other than a government official.

B. The Freedom to Assemble and Advocate Anonymously

Justice Harlan's decision in NAACP v. Alabama *ex rel.* Paterson, 357 U.S. 449 (1958), provides an eloquent explanation of how principles of anonymity are grounded in freedom of association, and how they apply irrespective of the particular tactic chosen by government to undermine dissent. In addressing an effort by the Attorney General of Alabama to force disclosure of the membership list of the NAACP of Alabama, Justice Harlan wrote that "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably

enhanced by group association.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters...." *Id.* at 460. He continued, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association...." *Id.* at 462.

Justice Harlan recognized that "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* at 461. An "unconstitutional intimidation of the free exercise of the right to advocate" can manifest itself with "a congressional committee investigating lobbying and of an Act regulating lobbying.... The governmental action challenged may appear to be totally unrelated to protected liberties [such as] [s]tatutes imposing taxes." *Id.* at 461. He drew upon a powerful and painful historical lesson when he found "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs [to be] of the same order" as a "'requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.'" *Id.* at 462. By the power of this illustration, Justice Harlan teaches us that principles of anonymity are not second-order concerns which can be disregarded or suppressed, but are standards indispensable to both the protection of individual liberty and the preservation of our republic.

Federal law sometimes requires forced disclosures of the identity of political actors to the government or third parties, triggering principles of anonymity. For

example, section 203(b)(1) of the Labor Management Reporting and Disclosure Act requires the filing of reports with the Secretary of Labor by:

> Every person who pursuant to any agreement or arrangement with an employer **undertakes activities** where an object thereof is, directly or indirectly ... (1) to **persuade employees** to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. [29 U.S.C. § 433(b) (emphasis added).]

Additionally, civil litigation also can lead to discovery demands which require evaluation of principles of anonymity. One important case illustrating those principles involved both statutory disclosures and discovery in a civil case.

In May 1973, the AFL-CIO, eleven other national and international labor unions, and some of their affiliates sued the National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "NRWLDEF") for, *inter alia*, failing to report to the Secretary of Labor under section 203(b)(1). NRWLDEF operated as an independent legal aid organization which had a long history of successfully fighting against compulsory unionism. *See* International Union, UAW v. National Right to Work Legal Defense and Education Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978), *further proceedings*, 584 F.Supp. 1219 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986).

In the ensuing litigation, the plaintiff unions sought to obtain the Foundation's contributor list, resulting in a discovery battle over the unions' demand for the names and addresses of all employers and businesses that contributed to the Foundation during a certain period. "The Foundation refused to disclose the identities of any contributors, asserting constitutional privileges against disclosure and contending that disclosure would result in reprisals against contributors." *Id.*, 590 F.2d at 1145.

The district court ordered the Foundation, *inter alia*, to identify "the thirty-seven donors who contributed between $500 and $5,000 in 1971," as well as certain 1972 donors of smaller amounts, and "to disclose the names and addresses of the fifty largest contributors to the Foundation in 1972 and 1973 who were not identified in the Foundation's own records as employers or businesses." The Foundation refused, and the district court, entering adverse findings as Rule 37 sanctions, found that the Foundation had violated the second proviso to 29 U.S.C. section 411(a)(4) (1976). *Id.*, 590 F.2d at 1145-46.

On appeal, the D.C. Circuit held that the Foundation had "asserted a substantial claim of constitutional privilege," citing Justice Harlan in NAACP v. Alabama, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a restraint on freedom of association...."). "Without doubt, the association itself may assert the right of its members and contributors to withhold their connection

with the association." International Union v. NRWLDEF, 590 F.2d at 1152.[9]

C. Freedom to Participate in Elections Anonymously

Americans cherish the secret ballot. They often do not want their family members and neighbors, much less the agents of their government, to know or record the candidates for whom they vote. All 50 states eventually adopted the secret ballot in an effort to curb voter intimidation and election fraud. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992). At the turn of the 20th Century, one observer wrote:

> We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.
>
> In earlier times our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and until night-fall, when the

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[9] The political value in obtaining the contributor list of an adversarial organization has not diminished with time. More than 30 years after International Union v. NRWLDEF was decided, UAW President Ron Gettelfinger expressed his continuing frustration with NRWLDEF donor anonymity when he stated at a press conference: "We've also been up against National Right-To-Work Legal Defense Foundation, who we don't even know who they are because **we can't find out who their contributors are**." (Emphasis added.) http://transcripts.cnn.com/TRANSCRIPTS/0812/12/cnr.02.html (transcript, Dec. 12, 2008).

> jubilation begins, our election days are now as peaceful as our Sabbaths.
>
> The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls. [Burson at 204, quoting W. Ivins, The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association 316 (1906).]

Indeed, it would be difficult to dispute Justice Stevens' conclusion that the anonymity principle is "best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." McIntyre v. Ohio Elections Commission, 514 U.S. at 343.

However, as Congress has made raising and spending funds to influence elections more and more a public spectacle, the right to a secret ballot has been eroded for those who wish to do more to influence an election than merely cast their vote. One astute commentator observed that with the posting on the Internet of the names, addresses, occupations, and employers of his campaign-contributing neighbors, he could virtually "peer ... inside the voting booth, the sanctum sanctorum of democratic freedom":

> True, a donation isn't a ballot. But the two are so closely related that revealing the former seems tantamount to revealing the latter. For me, giving and voting are parts of the same process. Because I can afford to, I back up my ballot with a small contribution. I see it as a

> civic responsibility.... Now I don't know if I'll contribute again. Because in doing so, I'll be broadcasting my beliefs to anyone who has a modem. [F. Bernstein, "An Online Peek at Your Politics," N.Y. TIMES, Oct. 4, 2000, at A35.]

Despite the virtual identity between the secret ballot and the anonymous campaign contribution, federal and state government officials have elevated their own desire to perpetuate their incumbency over the interests of the sovereign people.[10] And in the process, these officials have departed from the principle of anonymity in the promulgation of campaign finance regulations. For example, the Federal Election Campaign Act of 1971, as amended (hereinafter "FECA"), as modified by the Bipartisan Campaign Reform Act of 2002 (hereinafter "BCRA"), contains numerous provisions requiring the disclosure of contributions and expenditures made with respect to federal elections.[11]

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[10] "Over 50 percent of Americans believe that politicians want disclosure requirements so they can see who is giving money to their challengers. By a two-to-one margin, Americans believe that incumbents use agencies to harass the supporters of challengers" J Miller, Monopoly Politics (Hoover Inst. Stanford Univ.: 1999), pp. 104-105

[11] The FEC website contains an eight-page listing of the various types of reporting required to be made in 2010 — on a monthly or quarterly basis. Other reports may be due prior to or after primary elections, and after general or other elections. *See* http://www.fec.gov/pdf/2010reports.pdf. Individuals or organizations that receive contributions or make expenditures in excess of $50,000 in a calendar year must file electronically. Reporting responsibilities are imposed upon various types of

To date, this Court has never addressed a facial challenge to these FECA/BCRA reporting and disclosure requirements.[12] From Buckley v. Valeo, 424

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political committees, including: (i) authorized committees of candidates (including House candidates, Senate candidates; and Presidential candidates); (ii) state, district, and local party committees that engage in reportable "federal election activity," (iii) national party committees, and (iv) political action committees (including both separate segregated funds and nonconnected committees). Additionally, any individual or organization that makes an Independent Expenditure or disbursements for "electioneering communications" must disclose those expenditures. Bundling activity by federally-registered lobbyists must be reported. Political organizations that have annual gross receipts over $25,000, but which are not required to register with the FEC, are required to register and file reports in similar fashion to the Internal Revenue Service (hereinafter "IRS") using IRS Forms 8871 and 8872. *See* http://www.irs.gov/charities/political/article/0,,id=109644,00.html

[12] In McConnell v. FEC, 540 U.S. 93 (2003), a direct challenge to the BCRA's "electioneering communication" reporting and disclosure requirements was made by Congressman Ron Paul (R-TX), Gun Owners of America, Inc., RealCampaignReform.org (now DownsizeDC.org,), Citizens United, *et al.* The Paul plaintiffs invoked Freedom of the Press principles and authorities, arguing that:

> the enforcement mechanism employed by FECA/BCRA to assure compliance with individual contribution limits **intrude upon the editorial function of** candidates and their campaign committees, requiring **disclosure of the identities** of their major "publishers," *i.e.*, their individual contributors of more than $200. [Brief for Appellants Congressman Ron Paul, et al. (July 9, 2003), U.S. Supreme Court, No. 02-1747, p. 49 (emphasis added).]

Unfortunately, the Court never gave meaningful consideration to the Freedom of the Press arguments, brushing aside all Press arguments raised by the Paul plaintiffs with a dismissive

U.S. 1 (1976) to Citizens United v. FEC, 558 U.S. __, slip op. p. 50 (Jan. 21, 2010), the campaign finance forced disclosure rules have been considered only with respect to an "as applied" challenge, thereby limiting the anonymity principle vis-a-vis minor fringe organizations that pose no real threat to the established political order. Citizens United, slip op., pp. 54-55.

Only Justice Thomas has dissented, citing recent examples where mandatory disclosures of the names of donors have resulted in property damage, threats of physical violence or death. Justice Thomas rejected the view that "'[d]isclaimer and disclosure ... requirements impose no ceiling on campaign-related activities, and do not prevent anyone from speaking'" stating:

> Of course they do. Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights. [Citizens United, slip op., pp. 4-5, Thomas, J., dissenting (italics original).]

As Justice Thomas pointed out more particularly in his concurring opinion in McIntyre v. Ohio Elections Commission, the First Amendment press guarantee secures an absolute right of "anonymous speech," not

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footnote McConnell, 540 U.S. at 209 n.89

one subject to the balancing of interests of any purported need of government-enforced disclosure to ensure an informed public. *Id.*, 514 U.S. at 358-71. While Justice Thomas expressed immediate concern in Citizens United that such forced disclosure gives rise to the real threat of mob rule (Citizens United, slip op., pp. 1-4, Thomas J., dissenting), as have petitioners here (Petitioners' Brief, pp. 2-7), he also contended that "mandatory disclosure and reporting requirements" expose citizens to "the threat of retaliation from *elected officials*." Citizens United, slip op., p. 4 (italics original).

This latter threat is especially relevant here, where the people of Washington have reserved to themselves the power to reject laws enacted by the state "at the polls" through the referendum process. *See* Wash. Const., Article II, section 1. Article I, section 19, of the Washington Constitution provides that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." And Article VI, section 6, of that constitution provides that "[a]ll elections shall be by ballot," and mandates that the legislature "provide for such method of voting as will secure to every elector absolute secrecy in preparing or depositing his ballot." By his departure from 70 years of precedent protecting the anonymity of referendum petition signers, the Secretary of State has undoubtedly placed these constitutional guarantees in jeopardy and, thereby, abridged petitioners' privilege of freedom of speech in the legislative process, in violation of the Fourteenth Amendment.

CONCLUSION

The decision of the court of appeals should be reversed, with instructions to make permanent the injunction against disclosure of the names of the Referendum 71 petition signers.

Respectfully submitted,

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March 4, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
MAR 4 - 2010

No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY
OF STATE, and BRENDA GALARAZA,
PUBLIC RECORDS OFFICER FOR
THE SECRETARY OF STATE'S OFFICE,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public-interest legal center dedicated to defending the essential foundations of a free society, including the right of all to speak out on elections and other matters of public import. Mandatory disclosure laws that force those who speak out on ballot issues to reveal their identities to the entire populace serve no legitimate government interest and chill citizens' protected speech. For this reason, the Institute both litigates First Amendment cases that challenge mandatory disclosure in the ballot-issue context and files *amicus curiae* briefs in important campaign-finance cases, including *Citizens United v. FEC*, 175 L. Ed. 2d 753 (U.S. 2010); *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007); and *McConnell v. FEC*, 540 U.S. 93 (2003). Further, the Institute has published two empirical research studies that identify the burdens and costs of campaign-finance disclosure requirements. The Institute believes that its legal perspective, experience, and empirical research will provide this Court with valuable insights regarding the costs and burdens

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[1] The Institute for Justice has received the consent of all parties to file this brief with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

associated with mandatory disclosure of political activity.

SUMMARY OF ARGUMENT

1. Signing a petition in support of a ballot measure is core political speech that deserves full First Amendment protection. Indeed, this Court on five different occasions has recognized the important free-speech interests that surround ballot issues and has struck down regulations that chilled rights to freedom of speech and association in this context. To require that one publicly disclose his name and address in order to express the idea that a proposed measure should be placed on the ballot imposes a serious and unjustified burden on the exercise of First Amendment rights. This Court has upheld mandatory disclosure laws in the narrow context of candidate elections, *see, e.g., Citizens United v. FEC,* 175 L. Ed. 2d 753, 799 (U.S. 2010), but only where the laws have clearly advanced important state interests that could not be achieved through less burdensome means. *Cf. Davis v. FEC*, 128 S. Ct. 2759, 2775 (U.S. 2008) (striking down disclosure provision where related law was struck down). However, some lower courts have applied this Court's candidate disclosure holdings even where the context is ballot-issue elections, which do not involve the same state interests or burdens on speech as the candidate context. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003); *see also Richey v. Tyson*, 120

F. Supp. 2d 1298, 1310 (S.D. Ala. 2000) (committing same error). These lower-court holdings rest on the notion that disclosure provides vast benefits while imposing few, if any, costs on speech. On closer inspection, though, this view is based on nothing more than supposition and conjecture.

2. The Institute for Justice has surveyed public attitudes about disclosure laws in an attempt to determine the true costs of disclosure laws. The results were striking: while many respondents generally supported the idea of disclosure, that support quickly waned when they faced the prospect of having their own name and address made public. And three out of five said that mandatory disclosure would make them think twice before participating in the political process. This research focused on donating to an issue committee, rather than signing a petition, but its message is clear: forcing people to expose themselves to the public in order to exercise their First Amendment rights means that many will stay silent.

3. Signing a petition on a matter of public concern is core political speech and mandatory disclosure chills that speech. Respondents must therefore prove, with evidence, that publicly disclosing the name and address of every signer serves a compelling state interest. Neither of the justifications that Respondents offer is sufficient. The so-called "informational interest" is, at its heart, nothing more than the bare desire to know what positions others are taking on ballot issues. This Court rejected disclosure laws based on this interest in *McIntyre v. Ohio Elections*

Comm'n, 514 U.S. 334 (1995), and the alleged informational interest has no limiting principle. And although the State of Washington has a legitimate interest in maintaining the integrity of its referendum process, Respondents can achieve that interest through far more narrowly tailored means than public disclosure of every signer's name and address. Because Washington's scheme of mandatory disclosure imposes severe costs without serving any legitimate government interest, this Court should strike it down.

ARGUMENT

I. Signing a Ballot Petition Is Entitled to Full First Amendment Protection.

The citizen initiative is one of the hallmarks of our representative form of government. Using this process, and its close cousin, the referendum, citizens are able to directly impact the course of government decision-making. To this end, the process of qualifying and voting on a ballot measure is one that, perhaps more than any other, calls on the public to speak and debate about issues that are at the very core of the First Amendment. *See, e.g., Citizens United v. FEC*, 175 L. Ed. 2d 753, 775 (U.S. 2010) (concluding that political speech "is central to the meaning and purpose of the First Amendment"). As a result, the First Amendment's protection in this area is "at its zenith." *Buckley v. Am. Constitutional Law Found. (ACLF)*, 525 U.S. 182, 187 (1999) (internal

quotation omitted); *Meyer v. Grant*, 486 U.S. 414, 421 (1988) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

This Court has addressed restrictions on speaking and associating in the ballot-issue context on five different occasions in the past three decades. In every case, it has applied strict scrutiny and struck the law down. *See ACLF*, 525 U.S. 182 (1999); *McIntyre*, 514 U.S. 334 (1995); *Meyer*, 486 U.S. 414 (1988); *Citizens Against Rent Control v. City of Berkeley* (*CARC*), 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The restrictions in these cases varied widely. In *Meyer*, the question was whether Colorado could ban the payment of petition signature gatherers; in *McIntyre* and *ACLF*, whether individuals could speak about a measure without having to reveal their identities to the public; and in *CARC* and *Bellotti*, whether the government could restrict the campaign finances of those who wish to speak out for or against ballot measures. Still, the analysis this Court employed in each case was the same: It first looked at whether the provision burdened political speech. *ACLF*, 525 U.S. at 186; *McIntyre*, 514 U.S. at 347; *Meyer*, 486 U.S. at 425; *CARC*, 454 U.S. at 294; *Bellotti*, 435 U.S. at 785-86. If so, it then asked if the

provision satisfied strict (sometimes referred to as "exacting") scrutiny.[2]

The law at issue in this case falls squarely within these precedents and should be treated the same way. Requiring individuals to publicly disclose their names and addresses as a condition of signing a petition chills their speech, as many people do not wish their identities to be publicly disclosed or associated with their political views. Strict scrutiny should therefore apply. Respondents, however, contend that this Court should create a different level of scrutiny for laws that burden the First Amendment rights of petition signers on the grounds that the laws are merely disclosure laws. Brief of Appellants at 15-27, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818). This argument incorrectly relies on precedent that applies to disclosure laws in the candidate context, where the burdens and government interests are different than in the ballot-issue context. Equally important, however, the Respondents' approach would create a maze of new standards and fine distinctions that would turn on the identity of the speaker and the precise nature of his speech. This Court just rejected a similar approach in *Citizens United*. *See*

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[2] The Court has used the term "exacting" scrutiny interchangeably with "strict" scrutiny in these cases to mean that the government must show that its laws narrowly advance a compelling state interest. *See ACLF*, 525 U.S. at 192 n.12; *id.* at 206 (Thomas, J., concurring in the judgment); *McIntyre*, 514 U.S. at 345-46 & n.10; *Bellotti*, 435 U.S. at 786.

175 L. Ed. 2d at 782 (stating that "restrictions distinguishing among different speakers" are contrary to the First Amendment). It should do the same here.

A. Washington's Public Records Act Impinges on Signers' Right to Anonymous Speech.

As the Petitioners note, Washington's Public Records Act burdens the independent exercise of the right to speak which inheres in the act of signing a referendum petition, and should fall on that ground alone. Brief for Petitioners at 17-23. The Act also infringes on the right to anonymous speech and constitutes a separate and independent burden on First Amendment rights in that respect as well.

Unfettered participation in the political world often requires anonymity. In some cases, a would-be speaker may stay silent out of fear of the repercussions that may follow should his opinions become common knowledge. *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). In others, speakers may desire anonymity not out of fear, but because they want their message to be judged on its own merits rather than based on the identity of the speaker. *McIntyre*, 514 U.S. at 342. As the Court has noted, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). Thomas Paine signed some of the pamphlets that he drafted with pseudonyms. James

Madison, Alexander Hamilton, and John Jay wrote the Federalist papers as "Publius," and the Anti-Federalists who wrote against ratification responded to Publius' arguments using the names "Cato," "Brutus," and "the Federal Farmer." *McIntyre*, 514 U.S. at 343 n.6.

Many people will only sign a petition on a controversial subject like Referendum 71 if they are assured that their identities will be protected. To ensure that as many people as possible feel free to make their opinions heard, this Court has long protected speakers' anonymity in the face of an inquiring government or public. Fifty years ago in *Talley*, this Court struck down an ordinance that forbade the distribution of any handbill if it did not contain the name and address of the person who prepared it. In doing so, the *Talley* Court recognized that "[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes." 362 U.S. at 65. Likewise, the Court in both *McIntyre* and *ACLF* invalidated state laws that required would-be speakers to sacrifice their anonymity, which thereby "discourage[d] participation in the . . . process by forcing name identification without sufficient cause." *ACLF*, 525 U.S. at 200.

B. This Court's Cases Upholding Disclosure Laws Do Not Apply in the Ballot-Issue Context.

Although this Court has upheld mandatory disclosure laws, it has done so in the context of

candidate elections for contributors to a candidate or expenditures by independent speakers on their behalf. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 81-82 (1976). However, both the government interests and the burdens on First Amendment rights are different in the candidate context than in the ballot-issue context. In *Buckley*, this Court listed three interests that disclosure serves: (1) alerting "the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office;" (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 66-68. The disclosure laws that the Court upheld in *Buckley* were part of a regulatory scheme that affected only the "narrow aspect" of political association in which the government's interests in combating corruption were the greatest. *See id.* at 28.

The Court's approach to disclosure in *Buckley* and its progeny does not apply to laws such as the Public Records Act for two reasons. First, as this Court has repeatedly held, ballot issues do not involve concerns about corruption that have become the focus of and justification for candidate campaign-finance laws, including the disclosure laws that support them. Second, the interests listed in *Buckley* do not apply to ballot issues. Even the so-called informational interest listed in *Buckley* serves the

purpose of alerting voters to the interests to which *candidates* are likely to be responsive in order to facilitate predictions about their future performance in office. *See id.* at 67. This has no application in the ballot-issue context.

Nonetheless, some lower courts, most notably those in the Ninth Circuit, have uncritically applied *Buckley*'s holding to disclosure laws in the ballot-issue context. *See Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009) ("Referendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect. The interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot issue."); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1183 (9th Cir. 2007).

These courts often view disclosure laws as a relatively cost-free means of educating voters about ballot issues. But both sides of this equation are wrong. As the next section demonstrates, disclosure laws such as Washington's Public Records Act are not cost-free. As the following section shows, the alleged interest in voter education cannot justify the burdens these laws impose on First Amendment rights.

II. Mandatory Disclosure Laws Have Chilled the Exercise of First Amendment Rights.

This Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on . . . First

Amendment" freedoms. *Buckley v. Valeo*, 424 U.S. at 64 (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates*, 361 U.S. 516 (1960); *Patterson*, 357 U.S. 449 (1958)). *See also Talley*, 362 U.S. at 65 (1960) ("The reason for those holdings [in *Bates* and *Patterson*] was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."). Compelled disclosure can be particularly chilling in the case of ballot issues, which often involve a wide range of viewpoints on important and controversial subjects such as race, religion, and sexual orientation.

Notwithstanding this recognition, mandatory disclosure laws often have been assumed to be a form of "benign regulation that shines light on valuable information without any real costs." DICK M. CARPENTER II, INSTITUTE FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 1 (2007), http://www.ij.org/publications/other/disclosurecosts.html. As a consequence, mandatory disclosure laws have proliferated in recent years:

> All 24 states with ballot initiatives require disclosure to the government of contributors' personal information after minimal contribution thresholds are met. In the name of transparency and access to information, these laws require initiative committees to collect and report personal information about contributors, including names, addresses,

> contribution amounts and, in 19 states, even employers and/or occupation.

Id. at 3-4.

Here, Washington State has taken its requirement of disclosure to the government one step further by treating petition sheets that propose initiatives and referenda[3] as "public records." In this case, that means all 138,500 names and corresponding signatures and addresses will be made available to anyone who requests them, including third parties who have indicated that they will post the information on the Internet where it can be easily accessed and searched. Press Release, Knowthyneighbor.org, Whosigned.org Refutes Intimidation Charges; Will Post Names of Petition Signers as Planned (June 8, 2009), *available at* http://knowthyneighbor.blogs.com/home/2009/06/whosignedorg-refutes-intimidation-charges-will-post-names-of-petition-signers-as-planned.html.

Historically, many assumed that public disclosure imposed few, if any, costs on political speech, but that assumption had never been tested empirically.

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[3] Under the Washington State Constitution, any bill the legislature passes may be put up for a referendum. WASH. CONST. art. II, § 1(b). Qualifying a referendum for the ballot requires the signatures of Washington registered voters who constitute more than four percent of the total votes cast in the most recent gubernatorial election. *Id.* A petition signer must provide his name, signature, and the address at which they are registered to vote on the petition sheet, which state officials use to verify that referendum organizers have obtained the requisite support.

See Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 INDEP. REV. 537, 537 (1999), *available at* http://www.independent.org/pdf/tir/tir_03_4_milyo.pdf (stating that before the Institute's recent studies, "no one [had] analyzed systemically the effects of campaign-finance regulations on freedom of speech or association"). However, the dearth of any empirical analysis has made it "difficult to evaluate the desirability of either current laws or proposed reforms when the potential costs of various policies have been completely ignored by scholars and policy makers alike." *Id.*

Today, however, the empirical research conducted by the Institute for Justice and others, as well as recent threats, harassment, and reprisals facilitated by disclosure, demonstrate the manner in which mandatory disclosure laws chill First Amendment freedoms. *See Citizens United*, 175 L. Ed. 2d 753 at 872-74 (U.S. 2010) (Thomas, J., concurring in part and dissenting in part) (invoking "real world, recent examples" of intimidation and retaliation provided by *amici* to show the "fallacy . . . that disclaimer and disclosure requirements . . . do not prevent anyone from speaking").

A. Disclosure Creates a Disincentive To Engage in Political Activity.

In 2007, Dr. Dick Carpenter researched whether mandatory disclosure requirements impose burdens that chill political participation. *See* DISCLOSURE COSTS

at 5-6. Dr. Carpenter is an Associate Professor at the University of Colorado, Colorado Springs, where he teaches graduate courses in research methods and statistics, and he is the Director of Strategic Research at the Institute for Justice. *Id.* at 22.

Dr. Carpenter's research is the first of its kind to test questions that scholars have long raised about disclosure:

> [M]ore than 30 years ago political scientist Herbert Alexander warned against the "chilling effect" of [campaign-finance] laws on free speech and citizen participation. Alexander described a situation in which citizens might be reluctant to participate or speak for fear of unintentionally violating laws they knew little about or did not understand.
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> Brad Smith, former chair of the Federal Election Commission and current chair of the Center for Competitive Politics, also points to the not unheard of possibility of retaliation against citizens whose political activities are disclosed to the public by the state. Smith asks, "What is forced disclosure but a state-maintained database on citizen political activity?"

Id. at 5 (footnotes omitted).

Specifically, Dr. Carpenter's study contrasted individuals' general opinions about mandatory disclosure requirements in the abstract with their attitude

about those same requirements when disclosure affected them personally. Dr. Carpenter found that although individuals generally claim to support mandatory disclosure, that support drops off when those individuals consider the personal costs.

> [S]upport for disclosure wanes considerably when the issue is personalized. . . . [M]ore than 56 percent disagreed or strongly disagreed that their identity should be disclosed, and the number grew to more than 71 percent when disclosure of their personal information included their employer's name.
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> * * *
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> Indeed, when we compared respondents' support for disclosure generally to their support for disclosing their own personal information, we found a very weak statistical relationship, especially if disclosure of one's employer is required. In other words, enthusiastic support for disclosure laws does not translate into a belief that one's own personal information should be released publicly.

Id. at 7-8 (internal citations omitted). Furthermore, three out of five people said that they would think twice about donating to a ballot-issue campaign if it meant that the state would disclose their names and addresses to the public. *Id.* at 7. The bottom line is that "even those who strongly support forced disclosure laws will be less likely to contribute to an

issue campaign if their contribution and personal information will be made public." *Id.* at 8.

Significantly, when "asked, through open-ended probes, why they would think twice if their personal information was disclosed, the reason most often given (54 percent) was a desire to keep their contribution anonymous." *Id.* at 8. Typical responses included, "'Because I do not think it is anybody's business what I donate and who I give it to,'" and "'I would not want my name associated with any effort. I would like to remain anonymous.'" *Id.* Participants often recognized the impact of disclosure on their privacy, stating, for example, that "'I don't want other people to know how I'm voting,'" and disclosure "'removes privacy from voting. We are insured privacy [in] the freedom to vote.'" *Id.* Respondents also cited anonymity when asked why they would think twice before donating if their employer's identity were disclosed, saying things like "'It's not anybody's business who my employer is and it has nothing to do with my vote,'" or "'My employer's name is nobody's business.'" *Id.* at 9. Beyond the desire for anonymous political participation, individuals also had concerns over a variety of potential repercussions, including fear for personal safety, identity theft, invasion of privacy, and loss of employment. *Id.* at 8-9.

As discussed below, these concerns about personal or economic repercussions are far from hypothetical, especially in an age where campaign-finance reports are widely accessible through the Internet,

and are used more frequently to retaliate against political opponents.

B. The Fear of Intimidation, Threats, and Reprisal for Political Participation Is Real and Reasonable.

As the Petitioners make clear in their brief, the uncritical expansion of mandatory disclosure has given many people the tools to intimidate those with whom they disagree. In the most recent election cycle, for instance, supporters of several state ballot initiatives on same-sex marriage were subjected to various forms of reprisals that were made possible by the public release of information on initiative supporters. In California, for instance, supporters of Proposition 8 were subjected to death threats, physical violence, threats of physical violence,[4] vandalism,[5] and

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[4] *See, e.g.*, Ben Winslow, *Powder Scares at 2 LDS Temples, Catholic Plant*, DESERET NEWS, Nov. 14, 2008, *available at* http://www.deseretnews.com/article/705262822/Powder-scares-at-2-LDS-temples-Catholic-plant.html; Amanda Perez, *Prop 8 Death Threats*, ABC FRESNO, Oct. 31, 2008, http://abclocal.go.com/kfsn/story?section=news/local&id=6479861&pt=print.

[5] *See, e.g.*, *Prop 8 protestors vandalize church*, ABC FRESNO, Jan. 4, 2009, http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=6584961; *Anti-Prop 8 Vandals Hit Alto Loma Home*, ABC LOS ANGELES, Oct. 28, 2008, http://abclocal.go.com/kabc/story?section=news/local/inland_empire&id=6470557&pt=print; Chelsea Phua, *Mormon property defaced; Church struck by vandals in wake of vote*, SACRAMENTO BEE, Nov. 9, 2008, at B1; *Vandals Egg Downtown Fresno Church*, ABC FRESNO, Oct. 28, 2008,

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economic reprisals.[6] Significantly, this Court has already taken note of the threats, harassment, and reprisals directed at Proposition 8 supporters, *see Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (U.S. 2010), and characterized them as a "cause for concern." *Citizens United*, 175 L. Ed. 2d at 802.

Quite simply, the easy accessibility of one's personal information suggests that it is time for this Court to re-examine the conventional wisdom about the relative low cost of mandatory disclosure rules. In 2010, a person wishing to harass citizens with a different viewpoint no longer needs to visit a government office and pour through thousands of paper records to access this information. Now, data regarding one's political leanings, address, employer, and occupation are searchable from any computer, day or night. In such an environment, it is perfectly reasonable for individuals to fear the consequences of speaking out or participating in the political arena.

In sum, this Court should invalidate mandatory disclosure laws that "subject[ ] citizens of this Nation

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http://abclocal.go.com/kfsn/story?section=news/local&id=6473251&pt=print.

[6] *See, e.g.*, Steve Lopez, *Prop. 8 Stance Upends Her Life*, L.A. TIMES, Dec. 14, 2008, *available at* http://articles.latimes.com/2008/dec/14/local/me-lopez14 (describing the experience of a restaurant manager who made a personal donation in support of Proposition 8, ultimately resulting in the boycott of her restaurant); Jesse McKinley, *Theater Director Resigns Amid Gay Rights Ire*, N.Y. TIMES, Nov. 12, 2008, *available at* http://www.nytimes.com/2008/11/13/theater/13thea.html.

to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech." *Citizens United*, 175 L. Ed. 2d at 874 (Thomas, J., concurring in part and dissenting in part) (internal quotation omitted).

III. Washington's Public Records Act, As-Applied to Referendum Petitions, Fails Strict Scrutiny.

A. The Public Records Act Burdens Core Political Speech and Triggers Strict Scrutiny.

This Court has long held that laws that burden First Amendment rights must satisfy strict scrutiny. *See Meyer*, 486 U.S. at 423 ("[S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.") (internal quotation omitted); *see also WRTL II*, 551 U.S. at 464 ("Because [the statute] burdens political speech, it is subject to strict scrutiny."); *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny. . . .'"); *CARC*, 454 U.S. at 298 ("As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny.").

As the previous section shows, compelling citizens to choose between anonymity and political participation means that many will choose to remain silent. Washington's Public Records Act, by mandating release to

the public of every signer's identifying information, poses just this danger. But the Act also impinges on freedom of speech in two ways that mirror the harms that this Court identified in *Meyer v. Grant*. First, Washington's requirement that every signer disclose his name and address to the public means that a substantial percentage of the population will be unwilling to sign any referendum petition, no matter the topic. Because these people will reflexively refuse to sign, innumerable conversations about "the nature of the proposal and why its advocates support it" will go unspoken. *Meyer*, 486 U.S. at 421. Therefore, Washington's mandatory disclosure law "has the inevitable effect of reducing the total quantum of speech on a public issue" in the same way that Colorado's ban on paying circulators did in *Meyer*. *Id.* at 423. Second, mandatory disclosure will make it much harder to qualify any initiative or referendum for the ballot. Washington's law therefore frustrates the ability of initiative or referendum organizers "to make the matter the focus of statewide discussion." *Id.* All the conversations that would have taken place about the specific pros and cons of myriad proposals, as well as the discussions about what the scope of government should be generally, will be lost due to the chilling effect of the Public Records Act. For all of these reasons, strict scrutiny should apply here as it has in five other cases before this Court involving restrictions on speech and association in the ballot-issue context. *See* Section I, supra.

Under strict scrutiny, the Respondents bear the burden of demonstrating that the Public Records Act advances a compelling state interest and is narrowly tailored. *See Meyer*, 486 U.S. at 420. As this Court has stated, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). To satisfy this standard, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted).

1. This Court's discussions of mandatory disclosure in the candidate context do not provide a rationale for requiring disclosure in the ballot-issue context.

The Ninth Circuit's decision, and the argument put forth by the Respondents below, is based on an incorrect premise: that this Court's rulings upholding disclosure in the candidate context necessarily apply to the ballot-issue context. As a result, it held that only intermediate scrutiny applies in this case and that the Public Records Act should be upheld as it

applies in this case as a matter or course. *Doe*, 586 F.3d at 678. As stated above, however, this Court's cases upholding disclosure laws in the candidate context serve interests that are uniquely suited to the candidate context. Thus, the so-called informational interest at issue in *Buckley* involved the interest in providing voters with information "as to where political campaign money comes from and how it is spent *by the candidate* in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (emphasis added) (internal quotation omitted); *see also id.* at 79-80 (narrowing the reach of disclosure provisions so as to cover only "spending that is unambiguously related to the campaign of *a particular federal candidate*") (emphasis added). A few years after *Buckley*, this Court confirmed in *Brown v. Socialist Workers '74 Campaign Committee* that the interests announced in *Buckley* were indeed limited to the candidate context, stating that in *Buckley* "[t]he Court found three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures: enhancement of voters' knowledge about *a candidate's* possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations." 459 U.S. 87, 92 (1982) (emphasis added); *see also Davis*, 128 S. Ct. at 2775 (striking down disclosure provision that applied to candidates because law to which it was related was struck down).

These same concerns do not exist in the ballot-issue context because there is no candidate. A ballot issue is not beholden to any interests; it is what it is, and does what it is does, regardless of who favors or opposes it. *Cf. McIntyre*, 514 U.S. at 354 (stating that candidate disclosure is supported by "an interest in avoiding the appearance of corruption that has no application" to ballot issues).

This Court has never held that state governments have carte blanche to regulate any and all electoral advocacy as such. *See, e.g., Buckley*, 424 U.S. at 47-49; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Its decisions make clear that candidate campaign-finance cases provide support for disclosure laws in the candidate context only; they do not provide support for disclosure laws in the ballot-issue or petition-signature contexts. As a result, this Court should approach this case as it approaches any case involving a law that burdens First Amendment rights and apply strict scrutiny.

2. This Court's statements about ballot-issue disclosure laws are dicta and do not support the Washington Public Records Act.

Both the Respondents, and the court below, contend that the Public Records Act furthers a compelling government interest "in affording its citizens the opportunity to know who supports sending referendum measures to the ballot." Brief of Appellants

at 26, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818); *see also Doe*, 586 F.3d at 680 ("Referendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect. The interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot issue."). And while this Court has alluded to the utility of disclosure laws in the ballot-issue context, it has done so only in dicta and only in cases where it struck down laws that burdened speech about ballot issues. *See ACLF*, 525 U.S. at 202-04; *CARC*, 454 U.S. at 298-300; *Bellotti*, 435 U.S. at 791-92 & n.32.

For example, in *ACLF*, the Supreme Court struck down three regulations of ballot-petition circulators. 525 U.S. at 186-87. It was only after concluding that the regulations failed strict scrutiny that the Supreme Court commented in dicta about how the remaining provisions served the state's "substantial interests" in "protect[ing] the integrity of the initiative process, specifically to deter fraud and diminish corruption." *Id.* at 204-05. These included a requirement that the initiative sponsors disclose their names and the amounts they paid to petition circulators, as well as a number of other "process measures" such as requiring sponsors to submit a certain number of valid signatures, the single subject rule and others. *Id.* at 205.

The disclosure that the Court discussed in *ACLF* was of a far different kind than what is at issue in

this case. The Colorado law simply required the "*sponsors* of ballot initiatives to disclose who pays petition circulators, and how much." *Id.* (emphasis added); *see also id.* at 202 (referring to disclosure of "proponents' names and the total amount they have spent to collect signatures for their petitions"). A ballot initiative's sponsor is the one who drafts the initiative, pays petition circulators, obtains the necessary signatures, and ushers the initiative through the process of placing it on the ballot. The state's interest in knowing who the sponsors are and what they paid petition circulators simply does not support requiring those who sign petitions to disclose their names and addresses. After all, petition signers only sign a sheet of paper to say that a proposed measure should be put before the public. Because the First Amendment demands that the government justify each instance where the application of its laws would chill speech, *see WRTL II*, 551 U.S. at 478, any comments that the Court may have made in *ACLF*, *CARC*, or *Bellotti* about disclosure regimes that are not at issue in this case are beside the point.

B. The State Has No Compelling Interest in Providing Voters with Information About Who Signed a Referendum Petition.

Respondents' burden under strict scrutiny is not simply to contend that its interests are desirable or

even important, but that they are *compelling*. *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (state must present more than assertion and conjecture to justify restriction on speech). To do so, Respondents must offer more than speculation; they must offer evidence that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted); *see also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989) (striking down ban on party primary endorsements because the state presented no evidence that the law served the state's alleged interest in preventing confusion). But Respondents have offered no evidence that voters in Washington are suffering from a dearth of information about the issues in ballot-measure elections or that identifying other citizens who have signed a petition to place such measures on the ballot would address such an information gap even if it existed.

Campaign-finance scholars have recognized that mandatory disclosure can only provide benefits if the electorate actually accesses and uses the information as part of the decision-making process. Thomas L. Gais & Michael J. Malbin, *Campaign Finance Reform*, 34 SOC'Y 56 (1997). However, the DISCLOSURE COSTS study discussed above found that few citizens actually make use of information made available through disclosure laws. Carpenter, DISCLOSURE COSTS at 11-12. Other studies have shown, moreover, that

the press rarely reports such information. *See* Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L. J. 236 (2007) (comparing print news coverage of campaign finance in states with disclosure requirements to those without requirements); Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567, 579 (2009), *available at* http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf. The importance and operation of issues involved in a ballot-measure election simply do not turn on the views of other voters or those who support or oppose the measure or sign a petition in favor of its placement on the ballot. Voters appear to recognize this. In all events, Respondents have not shown that voters are suffering from a dearth of information or are otherwise unable to understand the issues involved in a ballot-measure election.

Respondents' argument thus reduces to the "simple interest in providing voters with additional relevant information" that this Court rejected as a justification for disclosure in *McIntyre*. *See* 514 U.S. at 348. Indeed, if anything, the government's "informational interest" is far weaker here than in *McIntyre*, because the information conveyed from any one signature on a petition is vague at best. It is not at all clear that those who sign a petition actually support its ultimate passage; many signers may simply wish to see the issue placed on the ballot. And even if particular signatures conveyed useful

information, the Respondents' argument is premised on the unfounded – indeed, counterintuitive – assumption that voters will root through hundreds of thousands of petition signatures to uncover a common view that they can then attribute to the referendum or issue committee itself. Far more likely is that those who are interested in intimidating voters and petition signers will scour petitions. *See* Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3 (detailing how her name and address appeared on the website of an animal-rights terrorist organization that had culled FEC records for donors whose employers perform animal testing); John R. Lott, Jr. & Bradley Smith, Op-Ed., *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, WALL ST. J., Dec. 26, 2008, at A13 (summarizing examples of individuals who faced economic retaliation for donations in support of Proposition 8).

While few citizens make use of the disclosure rolls, those who do often do not make the best use of the information they find. Seen from this perspective, the supposed virtue of disclosure may just as easily be described as a vice. There is just as much reason to conclude that voters would be confused or draw entirely incorrect conclusions about a referendum from the identities of those who signed a petition to get it on the ballot.[7] Worse, there is just as much

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[7] Many commentators laud voters' use of heuristic cues and support mandatory disclosure as a tool to provide voters with

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reason to think that the presence of a few notorious individuals in the rolls of signers would excite voter prejudices for or against a measure regardless of its underlying merits. *Cf. McIntyre*, 514 U.S. at 341-42 & n.5 (noting that the desire for anonymity may be motivated by fear of retaliation or ostracism and that anonymity can be beneficial in promoting objectivity). Indeed, the President of the Center for Governmental Studies in California has said that one purpose for requiring disclosure of contributions to ballot-issue campaigns is to let the voters keep track of "politically unpopular groups." Deposition of Robert M. Stern, President, Center for Governmental Studies, taken September 26, 2007, in *Sampson v. Coffman*, No. 06-CV-01858, 2008 U.S. Dist. LEXIS 70583 (D. Colo. Sept. 18, 2008) at 217:21-218:10. By monitoring government-mandated disclosure rolls to determine whether a member of a particularly disfavored group signed a petition or contributed to promote or defeat a

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this "necessary" information. But this information can impede, rather than improve, voters' decision-making. Some empirical research suggests, for instance, that listeners will often overlook a message's content because they instead focus on an unreliable peripheral cue such as the speaker's race or identity James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion in* ELEMENTS OF REASON 153, 174-75 (Arthur Lupia et al. eds., 2000). And in experiments, many voters' use of cues – such as supporting or opposing a referendum based on the identifying characteristics of those who sponsor the measure – actually harmed the quality of the decisions they reached. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951 (2001).

measure, voters can use that information to vote based, not on the underlying merits of the proposition, but on whether they "like or hate" such groups. *Id.* at 218:7.

Furthermore, the Respondents' alleged interest in informing voters has no limiting principle. The unacknowledged premise at the root of the Respondents' argument is that the *views, allegiances, and interests* of those who sign petitions will convey useful information to voters. A mere name and address is useless information unless a voter can determine what that name and address conveys. Thus, many states require those who contribute to ballot-issue committees to disclose their employers as well. *See* Carpenter, DISCLOSURE COSTS at 4. But there is no principled reason to stop there. Financial information, level of education, political and religious affiliations, and interest group memberships would convey far more relevant information if educating voters about ballot measures is truly the interest at issue. Knowing the name and street address of an individual who signed a petition conveys almost nothing. Knowing that the signer is a Republican or Democrat, a member of the NRA or the ACLU, or an atheist or devout Catholic conveys far more about the likely consequences of the ballot measures they support or oppose. But the right to associate is a fundamental aspect of the First Amendment, *Patterson*, 357 U.S. at 460, and the government cannot "compel[ ] disclosure of affiliation with groups" as a condition of being able to exercise one's right to speak. *See id.* at 462.

This Court should not accept the claim that states have a compelling interest in requiring those who sign a petition to disclose their identities and addresses simply to "inform" or educate voters. This alleged interest boils down to little more than the bare desire to know who is supporting what side of an issue. In this respect, requiring individuals to disclose their support for placing an issue on the ballot is not fundamentally different from requiring them to disclose which way they will vote in the election. *Cf. McIntyre*, 514 U.S. at 343.

C. Mandatory Disclosure of All Petition Signers to the Public Does Not Directly Further Washington's Interest in Preventing Fraud at the Petition Stage.

For the reasons stated above, providing information to voters about who signed a petition is not a compelling government interest. The Respondents, though, suggest that releasing the names and addresses of all 138,500 signers would help prevent fraud in the referendum petition process. *See* Brief of Appellants at 25-26, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818) ("Public access to signed petitions allows Washington citizens independently to examine whether the Secretary properly certified or properly declined to certify a referendum measure for the ballot, and to discover and report possible criminal law violations by petition signers."). Of course, all states with plebiscites have a strong interest in

establishing clear rules to ensure the integrity of their elections, such as rules that require that an initiative or referendum's sponsor demonstrates that a proposed measure enjoys a certain level of public support before it is placed on the ballot. And they likewise surely have an interest in making sure that that support is legitimate and not the product of fraud.

But as this Court has noted, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427. And to safeguard its initiative process, Washington has put in place an elaborate statutory scheme that, for many years, has functioned adequately without requiring the release of each and every petitioner's identifying information. *See* Wash. Rev. Code §§ 29A.72.130, .140, .230-50; *see also Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (noting only two prosecutions for petition fraud in the previous seven years). If the current statutory scheme is somehow lacking, Washington assuredly has less-restrictive means at its disposal than releasing the names of each and every signer to the public.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this Court reverse the opinion below.

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AMICUS CURIAE BRIEF

No. 09-559

In The
Supreme Court of the United States

JOHN DOE #1, ET AL.,
Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The right to petition government for redress of grievances may seem like a constitutional stepchild, rarely considered in modern case law. But it is a cornerstone of the First Amendment. This case puts the spotlight on the right to petition, as well as the more familiar rights to speech and association. If the Washington Public Records Act ("Washington PRA") is applied to require widespread disclosure of the names and residential addresses of all those who sign a

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

controversial petition, all of these rights are jeopardized.

The website organizers seeking disclosure of the Referendum 71 petitions may claim to facilitate free expression when they post lists of petition signers online to encourage discussion. But the intimidating effect is exactly the opposite. These broad, intrusive disclosures of personal information extend far beyond the borders of Washington State, to persons around the world with no legitimate claim to this information. And while these disclosure requirements undoubtedly merit strict scrutiny, even under a more lenient intermediate standard they must fall. Disclosures about *private* speakers do not promote *government* transparency, and existing statutory procedures adequately preserve the integrity of the referendum process.

I. THE REFERENDUM IMPLICATES A CLUSTER OF INTEGRALLY RELATED FIRST AMENDMENT RIGHTS: SPEECH, ASSOCIATION, AND THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES.

The First Amendment rights to free speech and press "were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." *Thomas v. Collins*, 323 U.S. 516, 530 (1944). These rights are inseparable but not identical.

Speech, association, and petition rights are all at stake in this case. The Washington petition signers have associated in order to speak to their elected

representatives and express their concerns about certain legislation. This "interactive communication concerning political change...is appropriately described as core political speech." *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 186 (1999) (*"Buckley II"*). The Ninth Circuit recognized the referendum as speech, implicating the First Amendment. *John Doe #1 v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009). But more fundamentally, this particular speech is a petition for the redress of grievances, addressed to the Secretary of State of the State of Washington. Its opening line identifies the private speakers as "[w]e, the undersigned citizens and legal voters of the State of Washington." *Id.* at 675.

This Court has long recognized the right to petition government as "one of the attributes of citizenship under a free government." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). The states may not abridge the right to peacefully assemble, discuss matters of public concern, and communicate respecting them. U.S. Const. Amend. 14, § 1; *Hague v. CIO*, 307 U.S. 496, 512 (1939) (striking down permit requirement for parades or assemblies). All citizens share this right to petition regardless of the content of their ideas. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003). The referendum process is a "basic instrument of democratic government." *Id.*, at 196, citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976).

Although it "look[s] to the modern eye almost like an afterthought," petitioning was "at the core of constitutional law and politics" in early America.

Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2153, 2157 (1998) ("*Vestigial Constitution*"). Far from being an afterthought, it was originally the "capstone" of the First Amendment. *Id.* at 2157.

The right to petition has a rich history that long predates the U.S. Constitution. Petitions were addressed to kings even before the Magna Carta, commonly as an appellate mechanism to correct error. *Id.* at 2163. Petitioning became part of the political fabric of England, whereby Englishmen communicated their grievances to the king and prayed for relief. *Id.* at 2169-2174. English colonists in America "understood petitioning as the foundation of politics and of individual and collective participation in politics, warranting the highest degree of protection." *Id.* at 2174. Early American colonies repeatedly affirmed the right to petition enjoyed by all persons. *Id.* at 2175. The Declaration of Independence bears witness to the primacy of petitioning as a vehicle for redress of grievances:

> In every stage of these Oppressions We have *Petitioned* for Redress in the most humble terms: Our repeated *Petitions* have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.
>
> The Declaration of Independence, para. 2 (U.S. 1776), cited in *Vestigial Constitution*, 66 Fordham L. Rev. at 2192 (emphasis added)

Petitions were a means of active participation in government for early American citizens, perhaps even more than voting. *Id.* at 2194. Many early state constitutions protected the right to petition. *Id.* at 2195. Instead of the deferential pleas to monarchs that characterized petitioning in past centuries, petitions in early America were the communications "of a free people [to] their servants." *Id.* at 2205.

More recently, the right to petition has received scarce consideration, having seemingly merged with other First Amendment rights such as speech, press, and association. *Id.* at 2155, 2158. Yet because it is still an essential component of the First Amendment, this case is an excellent opportunity to consider its nature and application in modern times.

A. Petitioning Is Neither An Act Of Government Nor Expressive Conduct Subject To Regulation.

The Ninth Circuit did not reach the State's argument that the referendum petition was a legislative act rather than protected speech. *John Doe #1 v. Reed*, *supra*, 586 F.3d at 677 n. 9. But the distinction between protected private expression and governmental action is critical to determining whether the mandated disclosures actually promote government transparency. This Court has held that:

> Statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, *do not, in and of themselves, constitute state action* for the purposes of the Fourteenth Amendment.

> *City of Cuyahoga Falls, supra*, 538 U.S. at 196 (no state action in referendum allegedly motivated by racial bias) (emphasis added)

The Washington referendum is an expression by the private citizens who signed the petition, not the speech or action of any governmental entity.

The Ninth Circuit acknowledged a speech "element" in the referendum but erroneously analogized it to the draft-burning expressive conduct in *United States v. O'Brien*, 391 U.S. 367 (1968). The opinion went further off track by assuming there was merely an "incidental deterrent effect" on potential petition signers that could be justified by the state interests asserted. But the "act" of signing a petition is more like writing a news article, book, or other communication that clearly constitutes protected speech rather than expressive conduct.

Petitioning is directly related to the legislative process in that the people are communicating their desire to place a political issue before the voters, who will vote to enact or repeal particular legislation. It also involves the "act" of lifting a pen and signing one's name. But regardless of these elements, the right of the people to petition government for redress of grievances is a core independent right protected by the First Amendment.

B. Referendum Procedures Must Comply With The First Amendment, And The Washington Public Records Act Must Not Be Applied In A Manner That Tramples The Right To Petition.

The referendum is a state-created right not mandated by the Constitution, yet it serves "[a]s a basic instrument of democratic government." *City of Eastlake v. Forest City Enters., Inc.*, *supra*, 426 U.S. at 678; *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009). Where a state does grant the right of referendum such as the one conferred by the State of Washington, the initiative procedure must conform to the U.S. Constitution. *Meyer v. Grant*, *supra*, 486 U.S. at 420; *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). This is comparable to the constitutional constraints on government entities that create limited public fora. Limits on access must be reasonable and viewpoint neutral in order to preserve and respect basic First Amendment rights. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993). Similarly, the State of Washington must not impose substantial burdens on the speech and association rights of citizens who utilize the state's referendum right (Wash. Const., art. II, §§ 1 & 1(b)) as a means to petition the state government for redress of grievances.

Courts must guard against unconstitutional applications of a statute. This Court refused to apply the Sherman Anti-Trust Act against railroads that

conducted a public campaign to bring about changes in laws related to truck weight limits--allegedly to restrain trade and monopolize the long-distance freight business. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). This Court explained that the Sherman Act could not prohibit persons from associating in an attempt to persuade the legislature to change the law, because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. If applied to such activities, the Sherman Act would improperly invade the First Amendment right to petition. *Id.* at 138-139. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition").

In a similar vein, when this Court upheld certain monetary disclosures for congressional lobbyists, the law was narrowly construed to avoid trampling the right to petition. The dissent would have gone even further, pointing out that:

> If this right [to petition] is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government.
>
> *United States v. Harriss*, 347 U.S. 612, 635 (1953) (Jackson, J., dissenting)

The citizens of the State of Washington are entitled to that same "large immunity" as they petition their state

government. Widespread disclosure of their names and residential addresses, under the rubric of *government* transparency and other pretenses, strays far away from the First Amendment's protective umbrella.

II. THE DISCLOSURE REQUIREMENTS MERIT STRICT SCRUTINY--BUT CANNOT EVEN PASS INTERMEDIATE SCRUTINY.

The people's exercise of their right to petition government is core political speech, "an area in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant, supra*, 486 U.S. at 425. This Court should "err on the side of protecting political speech rather than suppressing it." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2559 (2007). The "truth, popularity, or social utility" of the ideas expressed is irrelevant. *NAACP v. Button*, 371 U.S. 415, 445 (1963).

Burdens on core political speech merit exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("*McIntyre*"). Limitations on "the power of the people to initiate legislation are closely scrutinized and narrowly construed." *Meyer v. Grant, supra*, 486 at 423. There must be a "relevant correlation" or "substantial relation" between the statute and the governmental interest asserted. *Buckley v. Valeo, supra*, 424 U.S. at 64; *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). Moreover, the statute must be narrowly tailored to serve a compelling state interest. *McIntyre, supra*, 514 U.S. at 347; *Buckley II, supra*, 525 U.S. at 206. Even the Ninth Circuit has acknowledged this heightened level of scrutiny where the burden on core

political speech is severe. *Caruso v. Yamhill Cy. ex rel. Cy. Comm'r*, 422 F.3d 848, 859 (9th Cir. 2005), citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *Norman v. Reed*, 502 U.S. 279, 289 (1992).

Under some circumstances, it is appropriate to utilize a balancing framework, applying strict scrutiny only to more severe burdens. But when core political speech is at issue, this Court has "ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech." *Buckley II*, *supra*, 525 U.S. at 207-208 (Thomas, J., concurring). In *McIntyre*, this Court suggested that the severe/lesser burden framework was only appropriate for cases involving the mechanics of the process rather than speech itself. *McIntyre*, *supra*, 514 U.S. at 345. This case involves far more than mechanics. The people of Washington are "speaking" to their government to say that a particular issue should be placed on the ballot.

This Court has long recognized that compelled disclosures impose "significant encroachments" on political speech that require more than merely a legitimate state interest. *Buckley v. Valeo*, *supra*, 424 U.S. at 64; *Davis v. FEC*, *supra*, 128 S. Ct. at 2774-2775. The nature of the rights asserted--to petition government for redress of grievances, coupled with basic speech and association rights--along with the severity of the burden, warrants strict scrutiny by this Court.

The Ninth Circuit jettisoned strict scrutiny in favor of an intermediate standard, concluding that the mandatory disclosures were "incidental" restrictions that merely had to further "an important government

interest unrelated to the suppression of free expression." *John Doe #1 v. Reed, supra*, 586 F.3d at 679. But even under this relaxed standard, the statute must fall as applied to this case. These broadly tailored disclosures have an unreasonably chilling effect on the exercise of fundamental First Amendment rights and only a tenuous connection with the government interests asserted.

A. The Disclosure Requirements Do Not Further The Alleged Interests In Government Transparency And/Or Preserving The Integrity Of The Process.

As Justice Scalia observed in his dissent to the recently overturned *Austin* decision:

> [G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars).
>
> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) (overruled in *Citizens United v. FEC*, 175 L.Ed.2d 753, 798 (2010))

The State of Washington asserts noble objectives: "(1) preserving the integrity of the election by promoting government transparency and accountability; and (2) providing Washington voters with information about who supports placing a referendum on the ballot." *John Doe #1 v. Reed, supra*,

586 F.3d at 679. But Washington must connect the dots. The State must demonstrate a relationship between the interest it asserts and the burden it imposes on core political speech.

In *Bates v. City of Little Rock*, 361 U.S. 516 (1960) a city ordinance violated the local NAACP's constitutional right of peaceable assembly by requiring all "organizations" to file financial statements listing contributors and dues payers. The ordinance allegedly required this information to ascertain the validity of a tax-exemption claim. But that assertion did not save ordinance, because the record did not reveal that any tax claim had even been asserted against the organization, or that any exemption had ever been sought, claimed, or granted. This Court could not connect the "dots":

> In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People.
>
> *Id.* at 525

Similarly, there is no relevant correlation between the interest in government transparency and the proposed application of the Washington PRA (Wash. Rev. Code § 42.56.001 et seq.) against the petition signers.

1. The Statute Does Not Promote *Government* Transparency Because It Requires Disclosure Of Personal Information About *Private* Speakers.

Private speakers engaged in issue advocacy should not be subjected to intrusive disclosure requirements under the pretext of promoting *government* transparency. The Washington petition signers have associated to express their concerns on a particular issue. Widespread disclosure of their names and addresses has only a tenuous link to government transparency--an interest adequately served by the existing verification procedures to confirm the accuracy of petitions.

In *United States v. Rumely*, 345 U.S. 41 (1953), this Court refused to apply certain disclosure requirements against the Committee for Constitutional Government, an organization that sold books of a political nature. When the organization's secretary (Rumely) refused to disclose the names of bulk purchasers, he was convicted of violating a law that required disclosures for all congressional lobbying activities. This Court overturned his conviction, limiting the term "lobbying activities" to direct contacts with Congress rather than extending it to attempts "to saturate the thinking of the community." *Id.* at 47.

More recently, even the Ninth Circuit acknowledged the chilling impact of imposing disclosure regulations on grassroots lobbying. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). A church member used her own paper to make less than fifty copies on the church's copier of a petition to collect

signatures to place a proposed constitutional amendment on the ballot in November. The church also broadcast a film, "Battle for Marriage," in connection with its regular Sunday evening service. The service was open to the public, and five radio stations aired public service announcements about the film without charge to the church. The church also photocopied and distributed fliers about the film, through bulletin inserts and its lobby. The petition was circulated among church attendees one Sunday, at all three services, to collect signatures. The Ninth Circuit easily found that required disclosures of these de minimus expenditures violated the church's First Amendment rights. *Id.* at 1031. The names and home addresses of individual petition signers are similarly de minimus, contributing nothing to *government* transparency while imposing onerous, irrational burdens on the privacy of association.

Like the Committee for Constitutional Government and the Canyon Ferry Baptist Church, the Washington petition signers are engaged in classic issue advocacy that does not pose any potential for corruption or undue financial influence. The Ninth Circuit once held that "mandating disclosure of the financiers of a ballot initiative may prevent the wolf from masquerading in sheep's clothing." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 n.24 (9th Cir. 2003). But here, there are no monetary contributions or expenditures to disclose "as a control or check on domination of the initiative process by affluent special interest groups." *Buckley II, supra*, 525 U.S. at 202.

Moreover, this case does not implicate the danger of corruption that might arise in the context of a political campaign:

> [T]he second interest--deterring corruption or the appearance thereof--falls out of the picture in the context of ballot initiatives, for such referenda present no risk of *quid pro quo*. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . is not present in a popular vote on a public issue."); *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1056 (9th Cir. 2000) (same).
>
> *Canyon Ferry Rd. Baptist Church, supra*, 556 F.3d at 1031-1032; *see also Buckley II, supra*, 525 U.S. at 203, *Caruso, supra*, 422 F.3d at 856.

Finally, the government is not the party seeking the disclosures in this case. Private parties are requesting information about other private parties. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), the government sought a list of persons registered at a camp organized for political discussion. State law already required that the guest list be available to local law enforcement officers. The government was investigating subversive activities and had a compelling interest in self-preservation that was sufficient to override the camp guests' interest in associational privacy. *Id.* at 81. Here, there is no such overriding interest to justify the mandatory release of information *about* private persons *to* private persons.

2. The Governmental Interest In Preserving The Integrity Of The Process Is Adequately Served By Existing Statutory Procedures.

This Court has classified the integrity of the election process as a compelling interest. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Similarly, states should protect the integrity and reliability of the initiative process and have considerable latitude to do so. *Buckley II*, *supra*, 525 U.S. at 191; *John Doe #1 v. Reed*, *supra*, 586 F.3d at 679.

Washington has enacted statutory procedures that are narrowly tailored to preserve the integrity of the state's referendum process. When a referendum petition is filed, the Secretary of State verifies and canvasses the names of voters who signed the petition. Wash. Rev. Code § 29A.72.230; *John Doe #1 v. Reed*, *supra*, 586 F.3d at 674. Observation is permitted but observers may not make any record of the names, addresses, or other information on the petition sheets. During this procedure, the Secretary of State may limit the observers to two opponents and two proponents of the referendum. Wash. Rev. Code § 29A.72.230. Judicial review in the Superior Court is available to any Washington citizen who is not satisfied with the Secretary of State's determination. Wash. Rev. Code § 29A.72.240. In other cases, this Court has observed the adequacy of similar statutory protections: *Meyer v. Grant*, *supra*, 486 U.S. at 426-427 (Colorado statute addressed potential danger that petition circulators might be tempted to "pad" petitions with false signatures); *McIntyre*, *supra*, 514 U.S. at 351 (since Ohio had already addressed the problem of

election fraud, a ban on anonymous speech to accomplish the same purpose would be merely supplemental). These state statutes tackle real dangers without "indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *McIntyre, supra,* 514 U.S. at 357.

Washington's carefully drawn procedures fulfill the state's legitimate interest in the integrity of the referendum process and would most likely pass strict scrutiny. But further disclosures on the world wide web--far beyond the state borders and long after the referendum has been approved (or not)--impose a far greater burden. No one has an absolute right to contact any and every person who signed a particular petition.

B. The Disclosures Are Far More Extensive And Burdensome Than Necessary To Serve Any Interest In Informing *Washington* State Voters.

The right to privacy is rooted in common law but is even more important in the hustle and bustle of modern society:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to

> mental pain and distress, far greater than could be inflicted by mere bodily injury.
>
> Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196; cited in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 570 n. 7 (1963) (Douglas, J., concurring) ("*Gibson*")

The Washington PRA provides that "[t]he people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." Wash. Rev. Code § 42.56.030; *John Doe #1 v. Reed, supra*, 586 F.3d at 674. Courts have recognized the importance of the state's "informational interest." *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 nn.8-9 (9th Cir. 2007); *Canyon Ferry Rd. Baptist Church, supra*, 556 F.3d at 1032; *John Doe #1 v. Reed, supra*, 586 F.3d at 680. Similarly, this Court has acknowledged the state's interest in "protecting voters from confusion and undue influence." *Eu v. S.F. Cy. Democratic Cent. Comm., supra*, 489 U.S. at 225-226.

But there must be a viable link between these informational interests and the means used to achieve them. In *Caruso, supra*, 422 F.3d 848, the state's interest in informed and educated voting was served by a requirement that ballots for initiatives proposing local option taxes include a statement--the "three-percent warning"--that the measure could cause property taxes to increase more than three percent. There was a real connection between the state interest

and the required disclosure. Moreover, that disclosure was narrowly tailored to provide the relevant information voters needed to evaluate the proposal, without extensive, unjustified disclosures of personal information about any private speaker.

Caruso contrasts sharply with this case, which involves disclosure of the names and residential addresses of thousands of private citizens, far beyond Washington's borders, to entities and persons with no legitimate claim to that information. The disclosure requirements are broadly tailored to serve private purposes--not narrowly tailored to serve a compelling, important, or even legitimate state interest. This extensive disclosure is an onerous, unjustified invasion of the privacy of whose who signed Referendum 71.

1. Widespread Internet Disclosure Invades Protected Privacy Interests And Is Far Beyond Incidental.

Two private entities, KnowThyNeighbor.org and WhoSigned.org, have announced their plans to publish the names of the Washington petition signers on their internet websites in order to encourage "personal" and "uncomfortable" conversations. *John Doe #1 v. Reed, supra*, 586 F.3d at 675 n. 4. This is far beyond an incidental burden on the signers' First Amendment rights. As Justice Thomas recently observed:

> The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *preempt* citizens' exercise of their *First Amendment* rights.

Citizens United v. FEC, 175 L.Ed.2d 753, 873 (2010) (Thomas, J., concurring in part and dissenting in part).

KnowThyNeighbor.org has already posted internet lists of voters in four different states: Arkansas, Florida, Massachusetts, and Oregon. Washington is their next target.[2] WhoSigned.org is apparently limited to the State of Washington, but its website is accessible around the world, far beyond Washington's boundaries, to nonresidents who have no legitimate claim to personal information about Washington voters.[3]

The risk of compelled speech is substantial. Much like the identification badges for petition circulators in *Buckley II*, such broad disclosures compel "a message the [petition signer] might otherwise refrain from delivering" and deter signers who object to the invasion of their privacy. *Buckley II, supra*, 525 U.S. at 217 (O'Connor, J., concurring in part and dissenting in part). The law mutes the voices of those who want to sign the petition but object to further disclosure of their personal information, or who for other reasons do not want to engage in confrontational discussions. Some potential signers may be timid, elderly, battling health problems, or otherwise reluctant to risk being identified and targeted.

Of course, the organizers of KnowThyNeighbor.org and WhoSigned.org enjoy First Amendment rights to

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[2] Website last visited on February 19, 2010.

[3] Website last visited on February 19, 2010.

speak and attempt to persuade others to change their views. They have the right to reach willing listeners. *Hill v. Colorado*, 530 U.S. 703, 728 (2000). "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the *First Amendment*." *Buckley v. Valeo, supra*, 424 U.S. at 48-49; *Meyer v. Grant, supra*, 486 U.S. at 427 n. 7. Washington may not enhance the speech of these internet associations by stifling the expression of citizens who want to sign a referendum without engaging in further discussions.

The two internet groups, and those who share their views, have a wide array of options to promote their ideas without obstructing the speech of the petition signers or invading their privacy. In analyzing the right to be left alone, this Court has noted that "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings." *Hill v. Colorado, supra*, 530 U.S. at 716. A speaker's rights--even in a public forum--can be restricted when the unwanted speech intrudes on the privacy of a residence and cannot be avoided. *Id.* at 752 (Scalia, J., dissenting), citing *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding a ban on residential picketing). Widespread, prolonged internet disclosure of names and *residential* addresses is similarly intrusive. Internet groups can invite and encourage discussions, online or otherwise, but cannot encroach on the rights of others by compelling their participation.

This Court has identified an unwilling listener's interest in avoiding unwanted communication as part of the broader "right to be let alone," which Justice Brandeis described as "the most comprehensive of

rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Hill v. Colorado, supra,* 530 U.S. at 716-717. This is fundamentally a private citizen's right against government rather than other private speakers--here, the state government making disclosures as an application of the Washington PRA.

2. Petition Signers Consent To Restricted Disclosures That Serve Legitimate Purposes--Not Broad Internet Dissemination Of Their Names And Residential Addresses.

The Ninth Circuit focused on the limited disclosure that accompanies the petition signing process and attempted to bootstrap that into a more general consent. The petitions are signed in public places and a particular signer's name and address will be exposed briefly to the other 19 signers on that page. Later, the information is viewed by state representatives and observers during the verification process. *John Doe #1 v. Reed, supra,* 586 F.3d at 677. But while there is no guarantee of absolute confidentiality, these brief, limited disclosures are not the equivalent of long-term exposure on the worldwide web, far outside Washington's state boundaries and far beyond the time span of the referendum.

Some of this Court's previous decisions help clarify the limited nature of the petition signers' consent to further disclosure. In *Uphaus,* New Hampshire law required that a political camp's guest register be open to inspection by local law enforcement officers. *Uphaus v. Wyman, supra,* 360 U.S. at 80. Additional disclosure to the Attorney General was justified by the

compelling interest in investigation of subversive activities, particularly where there was some evidence of a nexus between the camp and Communist affiliations. *Id.* at 79. When the guests in *Uphaus* registered at the camp, they impliedly consented to the disclosure of their names to government officials. This Court distinguished *Uphaus* when rendering its decision in *Gibson, supra*, 372 U.S. 539. In *Gibson*, it violated associational privacy to mandate disclosure of NAACP membership lists to a committee created by the Florida Legislature to investigate infiltration of Communists, because there was insufficient evidence that NAACP members were involved in subversive activities. *Id.* at 550. More recently, this Court struck down a village ordinance that mandated a permit for door-to-door advocacy and required it to be displayed upon request. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) ("*Watchtower Bible*"). Even though door-to-door evangelists reveal their allegiance to a particular cause when they present themselves at the front door of a home to advocate, the ordinance implicated anonymity interests. *Id.*, at 166 (holding that ordinance violated the right to anonymous speech).

Referendum 71 signers consent to certain limited disclosures, including the petition circulator, others who sign the same page, and those who observe or participate in the Secretary of State's verification procedure. Like the *Uphaus* camp guests, they have no basis to object to this limited exposure. Unlike the NAACP membership lists in *Gibson*, the petition sheets are not absolutely protected. But as in *Watchtower Bible*, the petition signers' consent to restricted revelations of their identities cannot be construed as consent to widespread online

dissemination to anyone and everyone who wants to know.

3. The Statute Does Not Limit Disclosures To Reach Only Persons In *Washington* With A Legitimate Interest In The Information.

The reach of the Washington PRA, as applied to the petition signers, sweeps far beyond those persons who have an interest in access to their names and addressees.

In *State ex rel. Halloran v. McGrath*, 104 Mont. 490, 67 P.2d 838 (Mont. 1937), the Montana Supreme Court considered a citizen's request to review referendum petitions that had been submitted to the county clerk. The court issued a writ of mandate, reasoning that the citizen had both a statutory and common law right to inspect the petitions before they were forwarded to the Secretary of State. But the court qualified and explained the nature of the right. The common law right to inspect accrues to persons who have an interest in the subject matter of the records. *Id.* at 497. In *Halloran*, a citizen of *Montana* sought review of petitions for a *Montana* referendum.

The Ninth Circuit objected to the Washington statutory oversight procedure as being "insufficient to shift oversight from the special interest groups to the general public," because citizens have no reasonable basis to determine whether or not to challenge the Secretary of State's determination before initiating an action in the Superior Court. *John Doe #1 v. Reed*, *supra*, 586 F.3d at 679. Like the concerned Montana citizen in *Halloran*, perhaps a Washington citizen

would have a common law right to examine the petitions at the Secretary of State's office during normal business hours. But that is not equivalent to a right to retain copies of all the pages of the petition and disseminate the signers' personal information online, far beyond Washington's state boundaries.

4. The Disclosures Have A Stifling Impact On The Exercise of First Amendment Rights.

Compelled disclosures can seriously infringe protected First Amendment rights. *Buckley v. Valeo, supra*, 424 U.S. at 64; *Davis v. FEC, supra*, 128 S. Ct. at 2774-2775. More recently, this Court reaffirmed that principle in striking down name tag and income disclosures for petition circulators, because these restrictions "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Buckley II, supra*, 525 U.S. at 192.

Potential petition signers who value their privacy are likely to engage in self-censorship and decline to exercise their rights to speech, association, and petition. "[M]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). *FEC v. Wisconsin Right to Life, supra*, 127 S. Ct. at 2681. Just recently, Justice

Thomas observed that disclosure requirements can be used, either by government or private citizens, "to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of *First Amendment* rights." *Citizens United v. FEC, supra*, 175 L.Ed.2d at 873 (Thomas, J., concurring in part and dissenting in part) (emphasis in original). That is exactly what is occurring in this case. Voters who dare to sign a controversial petition must expose themselves to unreasonably broad intrusions on their privacy--or forego the exercise of their rights to speak, associate, and petition their government.

5. The Interest In Educating The Voters Does Not Trump The Right To Anonymous Speech Of Thousands Of Private Citizens. Washington Voters Do Not Need The Name And Address Of Every Individual Petition Signer To Make Informed Decisions About Referendun 71.

The right to anonymous speech is well established. Fifty years ago, this Court struck down a handbill identification requirement because it unduly inhibited the freedom to distribute information. *Talley v. California*, 362 U.S. 60, 64 (1960). Anonymous writings have played an important role throughout history, sometimes as the only means for a persecuted group to criticize oppressive laws. *Id.* at 64; *McIntyre, supra*, 514 U.S. at 341. There are many valid motivations, including fear of retaliation, social ostracism, or a simple desire to preserve privacy. *Id.* at 341-342; *Watchtower Bible, supra*, 536 U.S. at 166. Many Washington citizens may want to support

Referendum 71 without being targeted, ostracized, or disturbed by unwanted conversations on the subject.

The people of America are intelligent enough to evaluate anonymous speech. They can evaluate anonymity along with the content. *New York v. Duryea*, 76 Misc.2d 948, 966-967, 351 N.Y.S.2d 978, 996 (1974). "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). The people of Washington State can evaluate the content of Referendum 71 without knowing the names and addresses of the many thousands who signed it.

Even the Ninth Circuit has followed *McIntyre* and upheld the right to anonymous speech, holding that the deprivation of anonymity is "'a broad intrusion, discouraging truthful, accurate speech by those unwilling to [disclose their identities] and applying regardless of the character or strength of an individual's interest in anonymity.'" *ACLU of Nev. v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004), citing *Wash. Initiatives Now v. Ripple*, 213 F.3d 1132, 1138 (9th Cir. 2000) (quoting *Am. Const. Law. Found. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997). In *Heller*, the Ninth Circuit struck down a state statute requiring the names and addresses of financial sponsors on printed materials related to an election, candidate, or any question on the ballot. *ACLU of Nev. v. Heller, supra*, 378 F.3d 979.

In *McIntyre*, this Court held that the name and address of a handbill's author "adds little, if anything, to the readers' ability to evaluate the document's message." *McIntyre, supra*, 514 U.S. at 348-349. The

interest in providing voters with information does not justify requiring a writer to include statements that would otherwise be omitted. *Id.* at 348. The same is true here. Washington voters do not need the names and addresses of *thousands* of individual petition signers in order to formulate an intelligent response to the referendum.

The right to privacy of association is a natural corollary of the general right to anonymous speech:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.
>
> *Gibson, supra*, 372 U.S. at 544

Limitations on the right to band together to advance a ballot measure restrain the First Amendment right to freedom of association. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981); *Eu v. S.F. Cy. Democratic Cent. Comm. supra*, 489 U.S. at 224-225. These rights are implicated in the organization of PMW as a political committee under Washington law, in order to collect enough signatures to place Referendum 71 on the ballot and to encourage voters to reject SB 5688. *John Doe #1 v. Reed, supra*, 586 F.3d at 675 n. 2.

Compelled disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo, supra*, 424 U.S.

at 64, cited in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"--such as the broad disclosures contemplated in this case. *Bates v. City of Little Rock, supra*, 361 U.S. at 523. Speech and association rights "need breathing space to survive." *NAACP v. Button, supra*, 371 U.S. at 433. Protection of these rights is imperative "where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial." *Gibson, supra*, 372 U.S. at 556-557. The subject matter of Referendum 71 is highly controversial. Supporters do not waive their First Amendment rights to privacy of association when they sign petitions.

Even if there were some compelling reason to disclose the *names* of petition signers, disclosure of their private residential *addresses* is neither justified nor narrowly tailored. A Washington appellate court recognized this distinction in a case where citizens requested the names of county police officers and their ranks. These citizens maintained controversial websites critical of the police. The court acknowledged the public interest in law enforcement and ordered disclosures, pointing out that the information to be revealed did not include other, more private information: *home addresses*, home phone numbers, or social security numbers. *King County v. Sheehan*, 114 Wn. App. 325, 346, 57 P.3d 307 (2002). The Washington PRA contains an exemption for the

residential addresses of public agency employees. *Id.* at 343; Wash. Rev. Code § 42.17.310(1)(u). Moreover, these disclosures involved government officials performing their official duties--not private citizens exercising their personal First Amendment rights by signing the petitions. If the home addresses of public employees are protected, that information should be guarded all the more carefully where private citizens are involved.

CONCLUSION

In the name of "government transparency," the Washington PRA threatens to impose onerous burdens on the most fundamental First Amendment freedoms of its own citizens. This is particularly true for the right to petition government for redress of grievances:

> The right to petition is "among the most precious of the liberties guaranteed by the *Bill of Rights*," *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).
>
> *McDonald v. Smith*, 472 U.S. 479, 486 (1985)

The effect of the proposed disclosures would be to punish the Washington citizens who chose to endorse Referendum 71. If that occurs, opponents of the measure will have free reign to intimidate and retaliate, potentially skewing the results of future

petitions by penalizing those who dare to exercise their First Amendment rights. This Court should reverse the decision of the Ninth Circuit in order to ensure that this never happens.

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AMICUS CURIAE BRIEF

No. 09-559

IN THE
Supreme Court of the United States

JOHN DOE #1, et al.,

Petitioners,

v.

SAM REED, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., Gay & Lesbian Advocates & Defenders, National Center for Lesbian Rights, the Human Rights Campaign, and National Gay and Lesbian Task Force In Support of Respondents

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INTEREST OF AMICI[1]

Amici are the nation's leading organizations committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

Lambda Legal Defense and Education Fund, Inc. has appeared as counsel in hundreds of cases involving deprivation of rights based on sexual orientation and gender identity, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and numerous legal challenges to the adequacy of signatures gathered to qualify measures for the ballot and to the constitutionality of such measures. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Protect Marriage Illinois v. Orr*, 458 F. Supp. 2d 562 (N.D. Ill.), *aff'd*, 463 F.3d 604 (7th Cir. 2006), and *Doe v. Montgomery County Board of Elections*, 962 A.2d 342 (Md. 2008).

Gay & Lesbian Advocates & Defenders ("GLAD") has been involved for more than 20 years in various legal aspects of initiative and referenda, including *Schulman v. Attorney General*, 850 N.E.2d 505 (Mass. 2006); *Albano v. Attorney General*, 769 N.E.2d 1242 (Mass. 2002); *Wagner v. Secretary of State*, 663 A.2d 564 (Me. 1995); and *Collins v.*

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Secretary of the Commonwealth, 556 N.E.2d 348 (Mass. 1990).

The National Center for Lesbian Rights ("NCLR") has sought to achieve equality for lesbian, gay, bisexual, and transgender people for more than 30 years, including opposing and challenging ballot measures that target minorities. NCLR strongly supports laws such as Washington's Public Records Act that protect the openness and integrity of the legislative process.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 750,000 members and supporters nationwide committed to making this vision of equality a reality. HRC strongly supports the ability of all people, and particularly LGBT individuals, to advocate through lawful and nonviolent means against ballot initiatives that would subject them to unequal treatment under the law.

The National Gay and Lesbian Task Force ("Task Force") is the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender people. The Task Force strongly supports laws ensuring transparency in the ballot initiative process and giving all people the ability to advocate for their interests through lawful, peaceful means.

SUMMARY OF ARGUMENT

When subjecting a minority group to political attack, a common tactic is to claim that the minority is itself the aggressor from whom protection is required. Petitioners and certain like-minded groups are engaged in precisely such an effort by here and elsewhere accusing the lesbian and gay community and its supporters of subjecting opponents of legal protections for same-sex couples to a systematic and coordinated "intimidation campaign." Pet'r Br. at 3; *see generally* Pet'r Br. at 2-7 & at 10-11; Brief of Alliance Defense Fund ("ADF") as *Amicus Curiae* at 10-19; Brief of ADF as *Amicus Curiae*, *Citizens United v. Federal Election Commission*, No. 08-205 ("*Citizens United*") at 16-22, 130 S. Ct. 876 (2010); *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (per curiam) (noting "news articles" presented by applicants for stay alleging "incidents of harassment related to people who supported Proposition 8").

This tale is false and unsupported by the record. Because of this case's procedural posture, as well as the procedural posture in other cases where this narrative has been presented, the Court has not been provided with a complete and accurate presentation of facts so much as a series of one-sided accusations and hearsay never subjected to adversarial testing. Petitioners and their *amici* rush to characterize a handful of alleged incidents during the Proposition 8 and Referendum 71 campaigns as representing a systematic victimization crusade. A closer look reveals but a handful of allegations which, although serious if true, are of the sort endemic to many hard-fought political contests. A closer look also shows

that Petitioners' and their *amici's* hyperbolic story of a systematic campaign of "intimidation" and "reprisal" marries these incidents to a pool of trivial grievances and mere discomfort at the zealous but constitutionally protected speech used by some individuals to respond to the attack leveled at lesbians and gay men by the discriminatory initiatives. Moreover, not a single allegation on which Petitioners rely involves the signing of a petition. In effect, Petitioners and their supporters are trying to demonize and silence vigorous advocacy in support of equal rights that they disagree with – not protect their own right to speech.

Lesbian and gay individuals continue to face overwhelming violence, harassment, and discrimination. The petition process is a favored tool for subjecting such individuals to further discrimination – a tool against which lesbian and gay people, given their small numbers and disadvantages in the ballot initiative process, have few meaningful defenses. Petitioners seek, through their feint of victimization, to take away one of the few defenses that lesbian and gay individuals have to defend against hostile initiatives: the use of public records to stop the fraudulent qualification of such measures in the first place, and to lobby, through personal advocacy, the people who legislate using such measures. The Court should decline the invitation to scrap these protections based on a poorly-supported and largely fictitious tale that those who seek to deprive lesbian and gay Americans of rights are the ones being victimized.

ARGUMENT

I. LESBIAN AND GAY AMERICANS CONTINUE TO FACE DISCRIMINATION AND VIOLENCE.

At the outset, it is important to contrast Petitioners' accusations that that they are being victimized for opposing rights for same-sex couples with the reality that lesbian and gay individuals continue to face violence, harassment, and discrimination that dwarfs such allegations.

A. Discrimination, Harassment, and Violence.

Lesbian and gay individuals remain a frequent target for criminal attacks, both during contentious election campaigns and at other times. According to the most recent statistics collected by the FBI, 1,706 of 9,601 hate crimes reported in 2008 were motivated by sexual orientation. *See* FBI, *2008 Hate Crimes Statistics*.[2] Virtually all (98%) were directed against lesbians, gay men, and bisexuals. *Id.* In 2008, reports of hate crimes based on sexual orientation increased nearly eleven percent. *More Reported Hate Crimes in '08*, L.A. Times, Nov. 24, 2009, at A-16. These included at least twenty-nine known murders. *See* National Coalition of Anti-Violence Programs, *NCAVP Releases 2008 Hate Violence Report* (June 16, 2009).[3] Reported hate crimes are directed against gay people more than any other group per capita, and likely to be undercounted. *See* William B. Rubenstein, *The Real Story of U.S. Hate*

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[2] *Available at* http://www.fbi.gov/ucr/hc2008/victims.html.

[3] *Available at* http://www.ncavp.org/media/MediaReleaseDetail.aspx?p=2321&d=2454.

Crimes Statistics: An Empirical Analysis, 78 Tulane L. Rev. 1213, 1215, 1219 (2004). Youth overwhelmingly remain prey for abuse as well; more than eighty-six percent of LGBT middle and high school students experienced harassment at school the previous year based on their sexual orientation or gender identity, and more than thirty-six percent suffered serious physical assaults on that basis. *See* Joseph G. Kosciw, et al., *The 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, at xii – xiii (2008).[4] There is also significant evidence that the number of such attacks on lesbian and gay victims increases during and after referendum campaigns involving lesbian and gay issues. *See* Part I.B.2 *infra*.

Employment and public accommodations discrimination based on sexual orientation or gender identity also remains "a common occurrence" across the country. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Executive Summary at 2 (June 2007).[5] Public employment is no exception. *See* Brad Sears, et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, Executive Summary at 1 (Sept. 2009) (documenting a "widespread and persistent pattern

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[4] *Available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf.

[5] *Available at* http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf.

of unconstitutional discrimination on the basis of sexual orientation and gender identity against state government employees")[6]; *see also For Love of Country; Gays and Lesbians Should be Allowed to Serve Openly in the Military*, Wash. Post, Dec. 28, 2009, at A14 (more than 13,500 lesbian and gay members of the armed forces have been fired since 1994).

B. Political Attacks Using the Ballot Initiative Process.

Most relevant to the present case, lesbian and gay persons have been targeted by scores of ballot measures designed to treat them unequally to others. After a comprehensive study, University of Michigan political scientist Barbara S. Gamble concluded that "[g]ay men and lesbians have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-58 (1997). Between 1974 and 2009, one hundred fifteen ballot measures in eighteen states sought to repeal prohibitions of discrimination against LGBT people in the workplace, prevent or inhibit such prohibitions from being passed, or mandate discriminatory or stigmatizing conduct or speech towards LGBT people. *See* Brad Sears et al., *Voters' Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People*, 1974-Present at 15-1 – 15-2 (2009) ("*Voters' Initiatives*").[7] Such

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[6] *Available at* http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html.

[7] *Available at* http://www.escholarship.org/uc/item/58j4w7k3.

measures included Colorado's Amendment 2, which repealed existing sexual orientation anti-discrimination protections statewide and prohibited them from being adopted in the future, and which this Court held unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). Notwithstanding *Romer*, almost two dozen similar initiatives were subsequently introduced at local levels, including some as recently as last year. *Voters' Initiatives* at 15-8. Measures seeking to repeal laws prohibiting gender identity discrimination have now joined the fray. *See Doe v. Montgomery County Bd. of Elections*, 962 A.2d 342 (Md. 2008).

Initiatives seeking to withdraw equal rights from lesbian and gay people have not been limited to antidiscrimination laws. For example, Oregon's Measure 9 sought also to require all arms of government in the state to "assist in setting a standard for Oregon's youth that recognizes homosexuality . . . as abnormal, wrong, unnatural, and perverse." *Voters' Initiatives* at 15-4, 15-10. And in 2008, voters in Arkansas approved a measure prohibiting lesbians and gay men from adopting children or becoming foster parents. *See The Best Interests of the Child*, N.Y. Times, Jan. 6, 2009, at 24.

In recent years, many measures, like Referendum 71, have sought to overturn or block legislation and court decisions affording rights to same-sex couples. Over the last ten years, state initiatives or referenda barring same-sex couples from marrying and, in some instances, from obtaining civil unions, domestic partnerships or any rights at all have been on the

ballot in Arizona, Arkansas, California, Florida, Maine, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, and Oregon. All of those measures passed except an initial initiative in Arizona that would have barred domestic partner benefits. *See* Initiative and Referendum Institute, Ballotwatch, *Same-Sex Marriage: Breaking the Firewall in California?* at 3 (Oct. 2008)[8]; Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times, Nov. 5, 2008, at A1; Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, Boston Globe, Nov. 4, 2009, at 1. Initiative or referendum campaigns also led to the repeal of existing domestic partnership policies in Austin, Texas; Columbus, Ohio; Northampton, Massachusetts; and Santa Clara County, California. *See* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 Law & Soc'y Rev. 151, 181 n.10 (2009).

1. The Ballot Initiative Process Deprives Lesbian and Gay People of Conventional Political Protections.

The pervasive use of the ballot initiative as a tool for attacking the lesbian and gay community is no accident. The ballot initiative process bypasses all of the "political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). It eliminates bicameralism and presentment, removing veto points at which persuadable representatives or executives

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[8] *Available at* www.iandrinstitute org (click "Ballotwatch report on same-sex marriage measures")

might be willing to prevent enactment of hostile measures. It lacks a deliberative process or opportunity to propose amendments, thereby depriving minority members of opportunities to identify and persuade potential supporters or to engage in coalition-building. And it disconnects the fate of proposed legislation from other proposals, eliminating any opportunity for minorities to engage in bargaining through which they might secure temporary, situational majorities in their favor. *See generally* Akhil R. Amar, *Choosing Representatives by Lottery Voting*, 93 Yale L.J. 1283, 1304 (1984) ("Because of the structure of legislatures, minorities command more respect from majorities in a legislature than in the polity at large."); *Julian N. Eule, Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1555 (1990) ("Group representation ensures that diverse views are continually expressed, increasing 'the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected'").

In addition, voters, unlike legislators, take no oath to uphold the Constitution, nor do they engage in the same deliberative process that helps steer legislative action toward constitutional outcomes. *Compare Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions"). The absence of a deliberating mechanism in ballot initiatives allows popular "bare . . . desire to harm a politically

unpopular group" more easily to find political expression and to infect legislation. *Romer,* 517 U.S. at 634-35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (ellipses in original). These structural features leave minorities with few defenses against discriminatory initiatives.

2. Hostile Ballot Initiatives Are Commonly Associated with Increased Violence and Harassment Against Lesbians and Gay Men.

Given the use of initiatives to subject lesbian and gay Americans to unequal treatment, it is unsurprising that they tend to be accompanied by increases in violence against lesbian and gay people. Several California counties reported a spike in such crimes during the Proposition 8 campaign and immediate aftermath. *See, e.g.,* Tracey Kaplan, *Surge in Anti-Gay Hate Crime Cases, San Jose Mercury News*, March 16, 2009 (threefold increase in anti-gay hate crimes in Santa Clara County); Raja Abdulrahim, *L.A. County Hate Crimes Drop 4%*, L.A. Times, Nov. 20, 2009,[9] (20% spike in Los Angeles County, and hate crimes based on sexual orientation "were more likely to be violent than hate crimes motivated by race or religion"); Edmund G. Brown, Jr., Cal. Dep't of Justice, *Hate Crime in California 2008* at ii (Aug. 2009)[10] (16.7% spike statewide for

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[9] *Available at* http://articles.latimes.com/2009/nov/20/local/la-me-hate-crimes20-2009nov20.

[10] *Available at* http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc08/preface08.pdf.

2008, with 403 victims).[11] In Los Angeles County *alone*, there were nine hate crimes against LGBT individuals that the County found to have been expressly connected to and "prompted by Proposition 8," four of them violent. Los Angeles County Committee on Human Relations, *Hate Crime Report 2008*, at 14 (2008).[12]

This phenomenon is hardly unique to California. The same spike in hate crimes occurred in Massachusetts during consideration of a ballot measure to repeal marriage rights for same-sex couples. *See* Press Release, Fenway Health, *Fenway Community Health's Violence Recovery Program Releases 2004 Anti-LGBT Hate Crime Statistics at April 26 Press Conference* (April 26, 2005).[13]

II. Public Access to Petition Records Provides a Much-Needed Procedural Check on Anti-Minority Initiatives.

State election regulations that provide for public access to petition records provide at least some protection against hostile ballot initiatives. They allow for the detection and prevention of fraud in qualifying such measures for the ballot in the first place. They also provide lesbian and gay individuals

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[11] In stark contrast, there were only three incidents of "anti-heterosexual" crimes statewide and 21 targeting Christian denominations. *Id.* at 20.

[12] *Available at* http://www.lahumanrelations.org/hatecrime/data/2008%20Hate%20Crime%20Report%2011-12-09_08-09.pdf

[13] *Available at* http://www.fenwayhealth.org/site/News2?page=NewsArticle&id=5061&cmd=display.

with an opportunity to lobby the persons who legislate using such measures – partially restoring a political protection for minorities that is routine in the representative context but absent in referenda.

1. Opportunity to Prevent Fraudulent Certification.

The lack of any other meaningful checks on the initiative process gives the lesbian and gay community a critical interest in rigorous enforcement of requirements to qualify measures for the ballot.

The qualification process does more than "ensur[e] that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot." Pet'r Br. at 50. It decides whether issues will be resolved through the legislative or initiative process – a question in which minority groups have a vital interest, given the lack of procedural safeguards in the latter. *See* Part I.B.1 *supra*. And in many jurisdictions, including Washington, it suspends laws until after the results of the next general election is certified, which could mean months of delay. *See, e.g.*, Constitution of the State of Washington, Article II Section 1(d). Groups targeted for hostile treatment through the initiative process thus have every interest in ensuring that the procedural requirements for placing an initiative on the ballot are rigorously enforced.

These interests are not merely theoretical. In Montgomery County, Maryland, a newly-enacted ordinance prohibiting discrimination based on gender identity was recently blocked by certification of a repeal petition. *See Doe v. Montgomery County*

Board of Elections, No. 293857-V, at 1 (Md. Cir. Ct. July 24, 2008). Only after the involvement of citizens who challenged the signatures was it revealed that many were of "questionable" authenticity, including some that may have been "patently counterfeit." *Id.* at 17.[14] The Maryland Court of Appeals ultimately held that the petition should not have been certified and that the Board had improperly counted thousands of signatures that failed to meet state requirements. *See Doe v. Montgomery County Board of Elections*, 962 A.2d 342 (Md. 2008). Left to state officials alone this fraud would have gone undetected, and it temporarily succeeded in denying transgender persons the legal protections they had won through the political process.

Public access to petition records also allows the public to detect fraud attributing petition signatures to voters who did not sign or intend to sign the petition in question. Recent elections have, again, shown that this type of fraud is real. In Massachusetts, prosecutors from the State Attorney General's office launched a criminal investigation after disclosure of records from a petition to prohibit marriage by same-sex couples prompted complaints by "more than 2,000" people who discovered that their signature had been improperly attributed to the petition, either because of forgery or because

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[14] ADF, which argues that oversight by members of the public is unnecessary to preventing fraud, *see* ADF Br. at 19-21, represented the petition sponsors in *Doe*, whom the Court found to have relied on "questionable" and possibly "patently counterfeit" signatures. *Doe*, No. 293857-V, at *17.

organizers misled them as to which petition they were signing. *See* Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Boston Globe, Feb. 28, 2006.[15] Groups that find their rights attacked or their hard-fought legislative accomplishments blocked through the ballot initiative process have a clear interest in access to petition records to protect themselves against such abuses.

2. Opportunity to Lobby Sponsors Who Legislate Using the Initiative Process.

Public access to petition records also provides lesbian and gay people with the opportunity to defend themselves against hostile ballot measures by lobbying sponsors who support such measures at the petition stage to oppose them in the general election.

This interest is heightened by the lack of deliberative process in the initiative context. A group targeted by pending legislation can attempt to persuade, convince, and compromise with legislative representatives or members of the executive branch. For a group threatened by a pending referendum, however, the dispersal and anonymity of the referendum's supporters hampers comparable efforts to avert passage. Since the lesbian and gay

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[15] This type of fraud was documented on video during the Referendum 71 campaign. *See* DrivingEquality, *Anti-gay Signature Fraud Caught on Tape*, *available at* http://drivingequality.com/2009/07/23/anti-gay-signature-fraud-caught-on-tape/ (petition circulator falsely representing that Referendum 71 was initiative to legalize marriage for same-sex couples).

community is perpetually trying to defend itself against hostile referenda and lacks the numbers to defeat them at the polls itself, it depends critically on being able to lobby others to oppose them.

To be effective, such lobbying often requires highly personal communications. In addition to typical campaign tools, such lobbying can involve "coming out" to neighbors, co-workers, friends, and family members, (i.e. identifying oneself as lesbian or gay), as well as explaining how such discriminatory referenda will affect one's life in practice. Abstract political questions about lesbian and gay rights can take on a new perspective to voters who become aware of how such referenda will impact the lives of people they know. Indeed, decades of polls show that being aware that one has lesbian or gay friends, co-workers, and family members meaningfully increases the likelihood that someone will support legal protections for lesbian and gay people, including through antidiscrimination, partnership, and marriage laws. *See* Gregory B. Lewis, Working Paper 07-10, *Personal Relationships and Support for Gay Rights*, September 1, 2006 at 15-16 (Mar. 2007).[16] Thus, the ability to identify and lobby supporters of hostile petitions can help avert passage.

In this case, Petitioners have tried to caricature websites that identify petition supporters as "enabling . . . harass[ment] . . . at home and work." *See* Pet'r Br. at 3. But this discounts the role that

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[16] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975975.

such information serves in furthering communication, lobbying, and persuasion. On their face, the websites that Petitioners demonize urge lesbian and gay persons to engage in "neighbor-to-neighbor advocacy" and "face-to-face conversation[s] with someone you know," which "can sometimes be the most powerful agent of change." *See* About KnowTheyNeighbor.org, *available at* http://www.knowthyneighbor.org/national/ (last visited March 24, 2010).[17] Such conversations and opportunities for persuasion both serve a valuable First Amendment interest and operate as one of the few tools the lesbian and gay community has to defend itself.

III. THE FACTS DO NOT SUPPORT ALLEGATIONS OF SYSTEMATIC "HARASSMENT" AND "INTIMIDATION" OF GAY-RIGHTS OPPONENTS.

Petitioners argue that even these limited protections that lesbian and gay individuals retain against the referendum process should be stripped away to create a new First Amendment right for petition signers to legislate in secret. Although Petitioners have brought a facial challenge, their argument draws heavily upon the story that lesbian and gay persons and their supporters subjected the

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[17] *See also* ER 105 (co-director explaining that "conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors," and that such conversations are "'desperately needed to break down stereotypes and to help both sides realize how much they actually have in common.'").

supporters of Proposition 8 in California to an "intimidation campaign," Pet'r Br. at 3, causing supporters of such measures to be "intimidated from engaging in political speech," *id.* at 6, which they assert "would repeat in Washington." *Id.* at 10. *Amicus* ADF makes similar accusations, claiming "retributive acts" that were "prevalent and widespread" during the Proposition 8 campaign, ADF Br. at 13, "intimidation tactics," *id.* at 14, "retaliation," *id.* at 15, "many acts of physical violence," *id.* at 17, and "harassment [that] has become . . . severe," *id.* at 18; ADF has previously argued to the Court that such "reprisals are well-coordinated." ADF Br. as *Amicus Curiae* in *Citizens United* at 20.[18]

These characterizations sound serious. But they misstate the facts. We do not wish to trivialize instances of actual harassment or political violence in any political campaign; indeed LGBT individuals have frequently been on the receiving end of such violence, including during Proposition 8 itself. But while Petitioners have pointed to a few such alleged incidents during Referendum 71 and Proposition 8 – which we condemn if true – there is no basis for claiming that this small number of alleged unlawful incidents were part of any coordinated effort, nor that they differ in magnitude or kind from those that accompany any divisive political contest in this Nation (as the recent health care debate

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[18] *See also* Brief of the Institute for Justice as *Amicus Curiae* at 17-19; Brief ProtectMarriage.com - Yes on 8 as *Amicus Curiae* at 21-23.

demonstrates). To the contrary, there is every reason to believe that violent attacks on lesbian and gay citizens connected to Proposition 8 outnumbered the alleged instances of harassment against opponents of gay rights. *See* Parts I.A.1 *supra* and III.B *infra*. Nor is there any basis whatsoever for claiming that any person who chose to act in a legislative capacity by signing petitions to place these initiatives on the ballot was harassed. To the contrary, Petitioners' and ADF's allegations primarily involve persons who thrust themselves into the public spotlight.

To create the opposite impression, Petitioners and their *amici* have taken a handful of troubling allegations from the hard-fought Proposition 8 campaign – a campaign in which their side represented the prevailing majority – and married them to a much larger set of accusations that do not withstand any scrutiny. These include misrepresentations and exaggerations, self-serving accounts by supporters whose credibility appears questionable, complaints about problems endemic to hard-fought campaigns generally, and a laundry list of grievances resulting from the lawful exercise of First Amendment freedoms by the minority trying to defend lesbian and gay people from Proposition 8. The Court should not be misled by the false picture painted in this way. [19]

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[19] Petitioners' evidence stems primarily from two sources. The first are declarations and media reports pertaining to Referendum 71. *See* ER 024-43, 63-64, 82-130. The second are declarations from the separate district court litigation in *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DAD

A. The Record Does Not Support The Existence of a Chilling Effect on Petition Signers.

At the outset, Petitioners fail to link the experience of Proposition 8 with the issue presented in this case: there is not a single alleged incident of retaliation based on signing a petition opposing legal protections for same-sex couples. The best Petitioners have been able to come up with is that a lesbian couple "glared" at a woman signing their petition and tried (unsuccessfully) to lobby her not to sign by telling her that "[w]e have feelings too." *See* ER 034 ¶ 10.[20] This attempt to dissuade the woman,

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(E.D. Cal.) pertaining to Proposition 8. Petitioners introduced those declarations before the district court and rely on them extensively in their Brief. *See* Dkt. 4 Exs. 12-13. In *Hollingsworth*, the applicants similarly introduced a handful of declarations from leadership figures in the Proposition 8 campaign along with 72 news reports. *See* Exs. B & I-L to Defendant-Intervenors' Motion for Protective Order in *Perry v. Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal.). Some of petitioners' *amici* have also cited a Heritage Foundation report cataloging various allegations, most of them redundant *See* Thomas Messner, *The Price of Prop 8*, Heritage Foundation, Oct. 22, 2009. The undersigned *Amici* have consolidated and categorized the universe of the allegations presented to the Court in a document available at www.glad.org/doe-v-reed.

[20] ADF alleges that man in Truro, MA was not re-appointed to a volunteer board of fire engineers because he signed a petition supporting the repeal of marriage rights for same-sex couples. *See* ADF Br. at 12. But the selectmen who voted against the appointment expressly stated that considering his signature would be "out of line" and was not the basis for their vote. *See* Eric Williams, *Gay Marriage Petition Signature Riles Selectman*, Cape Cod Times, April 22, 2006, *available at* http://knowthyneighbor.blogs.com/home/2006/04/petition_signer.html?cid=16496447.

acting in her legislative role, was perfectly lawful. The First Amendment directly protects the use of "personal solicitation" and "social pressure" to urge others to join one's political cause; "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

Petitioners' inability to come up with any such evidence is telling. They try to excuse its absence by pointing to *Buckley v. Valeo*'s statement that one may instead "offer evidence of reprisals and threats directed against individuals or organizations holding similar views." Pet'r Br. at 28-29 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). But this alternative means of proof in *Buckley* is explicitly reserved for "[n]ew parties that have no history upon which to draw." *Buckley*, 424 U.S. at 74. There is ample "history upon which to draw" here. It points in the other direction.

Twenty-four states use ballot initiatives to enact legislation; all except California make petition records publicly available.[21] Between 1997 and 2009 there were eighteen statewide initiatives to deny or repeal legal protections for lesbians and gay men.[22]

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[21] *See* Ballot Initiative Strategy Center, *Ballot Integrity: A Broken System in Need of Solutions, A State by State Report Card* at 4, 9 (July 2009), *available at* http://bisc.3cdn.net/1fb0aa12d865ddd8c6_wwm6b9zwc.pdf.

[22] The data in this paragraph is drawn from the initiative and referendum database of the National Conference of State Legislatures. *See* http://www.ncsl.org/programs/legismgt/elect/dbintro.htm (last visited Mar. 31, 2010).

Hundreds of thousands of people signed petitions supporting the inclusion of such measures on the ballot. And yet with the resources of numerous advocacy groups opposed to rights for same-sex couples, Petitioners and their *amici* have been unable to come up with even a single example of a petition signer who suffered retaliation as a result. The total absence of such evidence belies any necessity of creating the new constitutional protection Petitioners request.

B. Petitioners' Isolated Allegations of Criminal Misconduct Targeting Advocates Lack Any Nexus to Signing Petitions.

Lacking such evidence, Petitioners and their *amici* allege the victimization of supporters of such measures more generally. In particular, they make the serious allegation that such supporters "became death threat targets," Pet'r Br. at 4; "feared physical harm to self or family," *id.*; and had their property vandalized. *See id.* at 4 & n.9. These serious allegations are wrong on two counts. First, there is no basis for claiming that such incidents, if true, were pervasive or even common – much less part of a "well-coordinated" campaign. *See* ADF Br. in *Citizens United* at 20-21.[23] They attracted extensive media attention precisely because – unlike such violence or threats against LGBT people – they were so exotic. The small number of such alleged incidents belies Petitioners' hyperbolic claim of an

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[23] ADF's charge of "coordinated" reprisals cites to nothing but a website advocating boycotts against businesses that supported Proposition 8. *Id.*; *see also* Part III.C.3 *infra*.

"intimidation campaign," much less a "great enem[y] of citizen participation in our Republic." Pet'r Br. at 3, 12. Second, such alleged instances were in large part directed at persons engaged in visible advocacy (or advocacy items, such as yard signs). While this is no excuse, the targeting of leaders and symbols is endemic to many heated campaigns. Such incidents provide no basis for keeping the legislative act of signing an initiative petition secret.

1. Reported Physical Violence Was Minor and Reported Threats of Physical Violence Were Rare.

Petitioners do not allege and present no evidence of actual physical violence against Proposition 8 or Referendum 71 supporters. ADF charges there were "many" such incidents but cites only two. ADF Br. at 17.[24] These and the handful of incidents alleged in news reports presented to the Court in *Perry*, while condemnable if true,[25] fall short of severe.

ADF makes much of the allegation that a woman named Phyllis Burgess was shoved, and had her

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[24] Both of ADF's accusations are based on allegations in a single news report of questionable objectivity. *See Radical Gay Activists Seek to Intimidate Christians*, Charisma News Online, Nov. 19, 2008, *available at* http://www.charismamag.com/index.php/news/19444.

[25] This is a big "if." Petitioners and their *amici* try to have their cake and eat it too by petitioning the Court to decide this case as a facial challenge, thereby avoiding adversarial testing of their "evidence," which is mostly inadmissible hearsay, while at the same time relying on that untested hearsay "evidence" to levy serious accusations.

styrofoam cross broken, at an anti-Proposition 8 rally in Palm Springs. *See* ADF Br. at 18. However, Ms. Burgess appears to have deliberately staged the incident for media attention: she was a frequent protester at gay events, informed officials prior to the rally of her intent to attend, and allegedly shoved her way to the front of the crowd in an attempt to get on camera, knocking a disabled man to the ground in the process, before others in the crowd pushed her in response. *See* Nicole C. Branbila, *Prop. 8 Debate Continues to Broil*, The Desert Sun, Nov. 16, 2008[26]; *Unfair & Unbalanced Media on Prop 8*, CNN iReport, Nov. 9, 2009.[27] The response to Ms. Burgess's physical disruption of a peaceful rally may not have shown appropriate restraint but is hardly an example of violence "targeting" Proposition 8 supporters.

The other incident alleged by ADF is no more helpful to their "intimidation" narrative. ADF alleges that someone shoved and hit someone with a bible and threw coffee during a "prayer walk" by a group that tries to "convert" gay people to heterosexuality, who decided to hold this walk through a gay neighborhood during the emotionally charged days immediately after the passage of Proposition 8.[28] As with Ms. Burgess, it equally

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[26] *Available at* http://www.mydesert.com/article/20081116/NEWS01/811160348.

[27] *Available at* http://www.ireport.com/docs/DOC-143195.

[28] *See* KTVU.com, *Anger over Prop. 8 Erupts in San Francisco*, Nov. 14, 2009, *available at* http://www.ktvu.com/news/17986914/detail.html. *see also* ADF Br. at 17.

involves people who deliberately thrust themselves into a position where an unfriendly reaction was foreseeable.

ADF also inappropriately suggests that supporters of marriage equality should be blamed for the highly-publicized mailing of suspicious powder to two Mormon temples and a Knights of Columbus printing plant in Connecticut. *See* ADF Br. at 14. Although the churches themselves were quick to blame these incidents on lesbian and gay opponents of Proposition 8, "the FBI had no evidence that linked the threats to Proposition 8 or its opponents." Ben Winslow, *FBI to run more tests on mystery substance mailed to LDS Church*, Deseret News, Nov. 18, 2008.[29] ADF's other accusation, of a church service disrupted in Michigan, *see* ADF Br. at 14, alleges no violence but at most a juvenile stunt and possible trespassing – and law enforcement officials dispute ADF's account.[30]

Other allegations of "violence" from media reports introduced in *Perry* include that someone threw a punch in a scuffle over yard signs,[31] that one high

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[29] *Available at* http://www.deseretnews.com/article/1,5143,705263982,00.html.

[30] *See* Todd A. Heywood, *Cops Contradict Reports of Mount Hope Church Protest*, Michigan Messenger, Nov. 14, 2008, *available at* http://michiganmessenger.com/8298/cops-contradict-reports-of-mt-hope church-protest.

[31] *See* KCRA.com, *Prop 8 Supporter Allegedly Attacked in Modesto*, Oct. 13, 2008, *available at* http://www.kcra.com/news/17708454/detail.html.

school student slapped another,[32] and that students opposing Proposition 8 threw water balloons at students supporting proposition 8.[33] If true, these three incidents are not hallmarks of high-minded debate, but they are a far cry from the types of systemic political violence implied by ADF or routinely faced by lesbian and gay persons during such campaigns. Los Angeles County *alone* documented four violent hate crimes, including serious assault, targeting LGBT individuals over Proposition 8. *See* Los Angeles County Committee on Human Relations, *Hate Crime Report 2008*, *supra* note 12, at 14.

Petitioners' allegations of *threatened* violence also are about three individuals who occupied leadership or advocacy roles in Proposition 8 and Referendum 71: Fresno Mayor Alan Autry and Pastor Jim Franklin; and the Director of Protect Marriage Washington, Larry Stickney. *See* Pet'r Br. 4 & n.7, 10-11; JA 9.[34] A leader of the Proposition 8

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[32] *See* Jennifer Bonnett, *Galt Attorney - Son Harassed by Teacher over Prop 8*, Lodi News-Sentinel, October 31, 2008, available at http://www.lodinews.com/articles/2008/10/31/news/7_harassment_081031 txt.

[33] *See* Aaron Bruner, *Prop 8 Supporters Face Sign Theft, Vandalism*, The California Aggie, October 29, 2008, *available at* http://theaggie.org/article/2008/10/29/prop-8-supporters-face-sign-theft-vandalism.

[34] Although one news article claims that a high school student received death threats from classmates, the claim is *triple* hearsay – a newspaper saying what a parent said his son had said other students had said. *See* Jennifer Bonnett, cited *supra* note 32. One of the *Bowen* declarants also conclusorily alleges a threatening Facebook or MySpace message *See* ER 207 ¶5

campaign made a similar, conclusory claim in *Perry*. *See* Declaration of Hak-Shing Tam ¶ 6, Sept. 15, 2009, attached as Exhibit L to Defendant-Intervenors' Motion for Protective Order in *Perry*. While persons who assume leadership in political campaigns should plainly not be subjected to such threats, it is unfortunately not uncommon: leaders of the "No on 8" campaign received them too. *See, e.g.*, Matthew S. Bajko, *South Bay No on Prop 8 Leader Receives Death Threats*, Bay Area Reporter, Nov. 20, 2008.[35] Nor are such threats unique to campaigns involving lesbian and gay rights; several lawmakers have faced death threats because of their positions on recent health care legislation. *See, e.g.*, Jim Abrams, *FBI Investigating Threats to Democrats*, Associated Press, March 24, 2010.[36] Threats against visible advocates on hotly-contested issues are an unfortunate reality, but do not prove that the hundreds of thousands of rank-and-file petition signers are threatened, nor that opponents of gay rights merit special exemptions from rules governing other citizens acting in a legislative capacity.

However, the declaration fails to provide the alleged message or any context necessary to evaluate the characterization.

[35] *Available at* http://www.ebar.com/news/article.php?sec=news&article=3491

[36] *Available at* http://www.google.com/hostednews/ap/article/ALeqM5iNzNTxkoXXj-xOcwrAcI2QSXKupwD9EL8FHG2.

2. Alleged Vandalism Incidents Overwhelmingly Targeted Visible Symbols of Political Advocacy.

There have also been allegations of personal property and churches that were in the forefront supporting Proposition 8 being damaged (usually spraypainted). The records in this case, *Bowen*, and *Perry* appear to contain allegations of maybe 20 such incidents.[37] Such property crimes should have no place in political campaigns, but it is a well-known fact of American political life that these things regularly happen. Churches that publicly opposed Proposition 8, such Unitarian congregations, experienced similarly vandalism in the other direction. *See, e.g.*, Andres Araiza, *Prop 8 Threat: Fresno Police close to Arrest*, KSFN, Oct. 31, 2008.[38]

While vandalism should never be excused, it is important to note that a huge number of such allegations consist of nothing more than stealing, ripping, or writing on yard signs and bumper stickers. *See, e.g.*, Dkt. 4, Ex. 13 at 52, 55, 61, 137, 146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 176-80, 182, 184-89, 191, 194, 198-99, 202-03, 205-07, 209, 216, 246, 253, 256, 259, 263. Such conduct is endemic to virtually any hard-fought political campaign. Signs for No on 8, Barack Obama, and John McCain were all routinely stolen in the California 2008 election too. *See, e.g.*, James Burger,

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[37] *See* www.glad.org/doe-v-reed.

[38] *Available at* http://abclocal.go.com/kfsn/story?section=news/local&id=6479879.

Polarizing Races Fuel Rampant Sign Thievery, Bakersfield.com, Oct. 22, 2008.[39]

Given a chance to complain about it, either side after any hard-fought political contest will have a laundry list of grievances about such conduct by the other side. There is no basis to claim that such acts were more common in this context than in any other – or warrant legislative secrecy.

C. The Vast Majority of the "Incidents" Reflect Mere Discomfort With Constitutionally Protected Disagreement, Criticism, and Advocacy.

Beyond the handful of criminal accusations, Petitioners and their *amici* support their tale of a systematic "intimidation campaign" with a mountain of declarations and media reports. While their list contains a handful of allegations of improper conduct, it is inflated by countless incidents in which opponents of lesbian and gay rights simply felt discomfort at being faced with vigorous but constitutionally protected expressions of disagreement. It is important to understand that when ADF refers to "harassment" and "reprisals" "punish[ing]" persons who supported Proposition 8, *see* ADF Br. at 18, it is mostly referring to such criticism.

1. Feelings Hurt by Mere Disagreement.

Many of the complaints Petitioners use to augment their "harassment" narrative involve

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[39] *Available at* http://www.bakersfield.com/news/local/x234175235/Polarizing-races-fueling-rampant-sign-thievery.

hypersensitivity and unwarranted claims of feeling "threatened" by innocuous disagreement. We will let some of these complaints of "intimidation" speak for themselves:

- A declarant complains that "members of the country club have made rude comments to me about my sign [supporting Proposition 8]" and that "[t]he openly gay members of the country club have changed their attitudes toward me. They used to greet me warmly; now, they give me looks of disdain and do not greet me as I pass." Dkt. 4, Ex. 13 at 52 ¶ 7.

- The business at which one declarant works received an email questioning whether the business's support for Proposition 8 "will prove true the axiom - any PR is good PR." Dkt. 4, Ex. 12 at 46 ¶ 5 & 50. The declarant claims to "feel threatened and uneasy" as a result. *Id.*

- Another complains that a "young woman" videotaped her publicly gathering signatures, and stated her intent to post the video on "MySpace and Facebook" so that others could "see what you are doing." ER 025 ¶¶ 9-10. The declarant "took this comment as a threat." *Id.*[40]

- Another claims to be upset that some people "pointed and whispered to one another in disapproval," during trick-or-treating,

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[40] The "young woman['s]" desire to document the declarant's public petition-gathering is understandable in light of fraud documented during the campaign. *See* note 15 *supra*.

ostensibly because of a yard sign. ER 226 ¶ 15.

- Petitioners also complain of a supporter whose pastor "told her to find another church." Pet'r Br. at 6. She is upset that her pastor "was not going to tell [the congregation] how to vote" on Proposition 8, even though she lobbied him to and thought he was required to, and "didn't think he had any right" to tell her that. Dkt. 4, Ex. 13 at 212 ¶¶ 4-6.

- Another complains that her gay brother "will no longer speak to" her after she told him she might vote for Proposition 8. ER 233 ¶ 8. She accuses the brother's partner of an "ugly and inflammatory email," which merely explains that the brother is upset because "[y]our views, among others, on proposition 8 has placed you in the camp of opposition to civil rights." *Id.* ¶¶ 4-6 & ER 237.

- Another complains [s]he "heard [co-workers] talking about me in ways that are not complimentary" after [s]he published writings advocating Proposition 8. *See* ER 244 ¶ 11.

- Another is upset that a woman at her church expressed disapproval of putting up signs at their church in support of Proposition 8. ER 251 ¶¶ 7-9. The declarant claims that this disagreement "shook [her] to the core." ER 252 ¶ 12.

The record is filled with these types of allegations. They are not only trivial, they reflect a fundamental refusal to accept the legitimacy of

speech that disagrees with the complainants' viewpoints, deeming it "hateful" or "harassing" simply because they do not like hearing it.

2. Feelings Hurt by Nonthreatening Incivility.

Many of the complaints also center around the theme that Proposition 8 opponents were rude – such as by using coarse language or obscene gestures. *See, e.g.*, ER 026-28, 036, 169-76, 204-05, 207, 217, 225, 247; Dkt. 4, Ex. 13 at 67, 87, 90-91, 96, 99, 100-101, 110-11, 122-35. As with their other allegations, Petitioners marry a small handful of possibly legitimate (although minor) complaints to a much larger set of complaints about speech by opponents that, while perhaps impolite, represents protected expression of their viewpoint that Proposition 8 was contemptible.

In the two cases that appear to allege real harassment, the police were notified and/or put an end to the inappropriate behavior. *See* ER 027-28, 032, 036, 208. Such harassment – which is commonly used to victimize lesbians and gay men – is often unlawful, and we expect law enforcement and the civil justice system to handle such cases appropriately. *See, e.g.*, *D.C. v. R.R*, No. B207869, __ Cal. Rptr. 3d __, 2010 WL 892204, at *24-34 (Cal. Ct. App. Mar. 15, 2010) (no First Amendment protection for cyber-bullying based on perceived sexual orientation). But much of is called "harassment" or "hate" in this case is nothing more than the vigorous expression of competing viewpoints.

a. Much of Petitioners' Evidence Is Exaggerated.

Much of Petitioners' evidence on this point is questionable. Many of the allegations turn on self-serving characterizations in declarations filed in this case and in the *Bowen* litigation, which have not been subjected to adversarial testing. Proposition 8 opponents and their calls or emails are alternatively characterized as "aggressive," "rant[ing]," "yelling," "hateful," "upset," "becoming angry," "threatening," "ugly," and so on. *See, e.g.*, ER 134 ¶ 18; ER 225 ¶ 7; ER 251 ¶ 9; Dkt. 4 Ex. 13 at ¶ 7. Where additional details are available, however, those characterizations are contradicted by the documentary evidence. For instance, an email saying that declarant's support for Proposition 8 "has placed you in the camp of opposition to civil rights" is characterized as "ugly and inflammatory." ER 233 ¶¶ 4-6 & 237. A woman's voicemail "[u]sing sarcasm" that "told [declarant] we must be proud of our decision to donate to Proposition 8" is characterized as a "hate call." ER 247 ¶ 6. A letter explaining how Proposition 8 affected the life of the author and civilly criticizing the declarant's choice to support it is characterized as "insulting me personally." ER 184 ¶ 6 & 188. And so forth. The declarants' demonstrably loose use of conclusory and loaded terms in describing the demeanor and conduct of opponents directly undermines their hyperbolic and unfounded claims of coordinated intimidation.

b. Even Taken at Face Value, Many Incidents Allege Nothing More Than Vigorous Advocacy.

Even if the accusations are taken at face value, the accounts of "harassment" in the record are virtually always nothing more than supporters' taking offense at constitutionally protected criticism of their political efforts.

Many allegations surround some opponents' use of profanity and harsh language in expressing their political views. Such language may be shocking or embarrassing to the listener. So long as such expression is peaceful, however, it is plainly protected speech. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("words are often chosen as much for their emotive as their cognitive force"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("so long as the means are peaceful, the communication need not meet standards of acceptability").

For instance, a number of supporters received emails that used insulting language to criticize their support for Proposition 8. *See, e.g.*, ER 214, 217 (email calling declarant a "terrible person" for supporting Proposition 8 because it is "unforgivable" to support "tak[ing] away people's rights"); Dkt. 4 Ex. 13 at 76, 79 (voicemail at work saying "it's really disheartening to know one of my neighbors supported Proposition 8 so heavily. What a scum-fuck."); *id.* at 239, 243 (email stating "Someday you will have to account for the fact that you refused to love your neighbor, but in the meantime I hope your

life is full of oppression and injustice as this is the kind of life you wish for others. You're a queer-hating douchebag. Fuck you.").[41]

Such language is not polite. But opponents have every right to express their belief that Proposition 8 was offensive. Moreover, many of the supposedly "harassing" emails were not sent to Proposition 8 supporters personally, but rather were complaints to businesses submitted through public websites. *See, e.g.*, ER 159, 168-76; Dkt. 4 Ex. 13 at 119, 122-35.[42] Similarly, the alleged "obscene gestures" encountered by supporters took place while supporters were out waving signs in support of Proposition 8 on public streets and intersections, evidencing the nonthreatening context as well as the complainants' own actions in directing their speech at a potentially unfriendly audience. *See, e.g.*, Dkt. 4, Ex. 13 at 64, 249; ER 225.

3. Dislike of Constitutionally Protected Boycotts.

Petitioners' *amici* further complain about "retaliation . . . in economic form." *See* ADF Br. at 15-17; Brief of American Center for Law and Justice

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[41] Because Petitioners brought a facial challenge and relied heavily on evidence from *Bowen*, it is unclear whether these emails or calls were actually from acquaintances rather than strangers.

[42] Some of the declarants engaged in this exact type of vigorous debate before filing a lawsuit asking to be protected from it. *See, e.g.*, Dkt. 4 Ex. 13 at 135 (emailing Proposition 8 opponent that that they "[s]hould be ashamed" for supporting marriage equality and calling it "[d]isgusting").

as *Amicus Curiae* at 13. But such advocacy lies at the heart of First Amendment protections, with a long tradition in our democracy as a means for minority groups to express dissent. *See Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (recognizing First Amendment right to engaging in picketing for express purpose "to induce . . . customers not to patronize" targeted business); *Claiborne Hardware Co.*, 458 U.S. at 909-15 (right to engage in concerted action advocating boycott). As the district court recognized in *Bowen*, "[t]he decision and ability to patronize a particular establishment or business is an inherent right of the American people," and "individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message without resort to non-violent means." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009). Lesbian and gay people have every right not to patronize businesses or individuals who act to deprive them of their rights, and to encourage others to do the same.

Groups opposed to legal protections for lesbian and gay individuals, moreover, routinely boycott companies that they deem too friendly to gay people. Recent examples have included McDonalds and Disney. *See, e.g.*, Frank Ahrens, *Gay-Marriage Opponents to Boycott McDonalds*, Wash. Post, July 4, 2008 at D1[43]; *see also Southern Baptists vote for Disney Boycott*, CNN, June 18, 1997.[44]

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[43] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/03/AR2008070303769.html.

[44] *Available at* http://www.cnn.com/US/9706/18/baptists.disney/

In fact, many of the allegations do not involve any kind of organized boycott at all – only uncoordinated and/or inchoate statements by individual lesbian and gay persons (or their supporters) that they would stop patronizing businesses or urging others to do the same. *See, e.g.*, Pet'r Br. 11; J.A. 9; ER 172-73, Dkt. 4 Ex. 13 at 46, 50, 122-29, 131. Any chill arising from such perfectly legitimate speech is *de minimis*.

4. Exaggerated Threats to Supporters' Employment.

Petitioners also complain that "individuals were fired or forced to resign for supporting traditional marriage." Pet'r Br. at 5.[45] Here, again, the flood of media reports cited by Petitioners and their *amici* creates the impression of a veritable wave of reprisals, but all report the same three resignations: Scott Eckern (director of the California Musical Theater); Richard Raddon (director of the L.A. Film Festival); and Marjorie Christoffersen, the manager of her parents' restaurant. *See* John R. Lott Jr. & Bradley Smith, *Donor Disclosure Has its Downsides*, Wall St. J. Dec. 26, 2008.[46] All three worked for institutions with substantial patronage by members of the lesbian and gay community. *See, e.g.*, Karen Grigsby Bates, *Backers Of Calif. Gay Marriage Ban*

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[45] Petitioners choose their words carefully, alleging not actual incidents but "*news media report* [sic] that individuals were fired or forced to resign." Pet'r Br. at 5.

[46] *Available at* http://online.wsj.com/article/SB123025779370234773.html.

Face Backlash, NPR, March 5, 2009[47]; *see also* Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, Wall St. Jour. Dec. 27, 2008.[48] News reports also indicate that Ms. Christoffersen "returned to the café when the protest faded." *Id.*

Reasonable people can disagree as to whether criticism of the institutions headed by these three individuals represented a sensible or worthwhile use of Proposition 8 opponents' right to criticize and decline to patronize businesses, but, again, there was nothing even remotely illegal about such criticism. *See Claiborne Hardware Co.*, 458 U.S. 886 at 909-15; *Organization for a Better Austin*, 402 U.S. at 419.

Allegations beyond those three cases are contradicted by the facts. The Brookstone manager cited by Petitioners was terminated for treating a colleague unprofessionally by telling her that "your homosexuality, I think it's bad stuff," and calling her "lifestyle . . . deviant," not for any political position. *See* Pet'r Br. at 6-7 n.14 (citing Joshua Rhett Miller, *Massachusetts Man Says He Was Fired for Telling Colleague That Her Gay Marriage Is Wrong*, Fox news.com, Nov. 9, 2009).[49] The fire engineer cited by ADF, *see* ADF Br. at 12, was merely criticized for his support of an anti-marriage petition, not fired for it. *See* n.20 *supra*. And the high school guidance

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[47] *Available at* http://www.npr.org/templates/story/story.php?storyId=101460517.

[48] *Available at* http://online.wsj.com/article/SB123033766467736451.html.

[49] *Available at* www.foxnews.com/story/0,2933,572862,00.html.

counselor who starred in a television ad asking voters to "to prevent homosexual marriage from being pushed on Maine students" faced an ethics complaint by a fellow social worker, not loss of his job or a complaint by the National Association of Social Workers as alleged. *See* Pet'r Br. at 5 n.10 (citing A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009).[50] Petitioner's and ADF's allegations of supporters' losing their jobs over their political views, like their other accusations, are mostly hot air.

* * * * *

The allegation that a small minority of lesbians and gay men has somehow managed to intimidate the majorities that have successfully targeted them for unequal treatment, in ballot initiative after ballot initiative, is outlandish. A handful of allegations made during the heat of the Proposition 8 campaign may have attracted extensive media attention because claims of 'pro-gay' harassment and violence were so novel, but that does not change the fact that the coordinated and sweeping campaign of reprisal painted by Petitioners and their *amici* does not exist and never has. They are telling this story cynically to demonize speech opposing their political efforts and to strip away the few protections that minorities have against the hostile initiatives they sponsor. The Court should decline their invitation.

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[50] Available at www.bangordailynews.com/detail/130565.html.

CONCLUSION

The judgment of the Court of Appeals should affirmed.

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AMICUS CURIAE BRIEF

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JOHN DOE #1, JOHN DOE #2, and PROTECT MARRIAGE WASHINGTON,
Petitioners
v.

SAM REED et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia and Washington, D.C. and has hundreds of affiliate attorneys in every state. Liberty Counsel has represented individuals and faith-based non-profit organizations in matters addressing free speech, expressive association and free exercise rights under the First Amendment of the United States Constitution.

Liberty Counsel frequently seeks injunctive relief to halt ongoing and threatened infringement of its clients' First Amendment rights. The lack of speech protective standards in preliminary injunction analysis has led to inconsistent and uncertain results. This in turn has led to uneven protection of fundamental First Amendment rights. A similar scenario was present in this case, and the lower court decisions illustrate how fundamental First Amendment rights will continue to be eroded unless speech protective standards are implemented. Liberty Counsel respectfully submits this brief outlining a proposed speech-protective

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[1] Amicus files this brief with the consent of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

test for preliminary injunctions for the Court's consideration.

SUMMARY OF ARGUMENT

As recently as October 2, 2009, the Ninth Circuit acknowledged that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to support a preliminary injunction. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976)). However, only 20 days later, the Ninth Circuit panel hearing this case wholly disregarded the irreparable harm posed by deprivation of First Amendment freedoms when it overturned a preliminary injunction despite evidence that denial of the injunction would endanger citizens who exercised their right of referendum. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (decided October 22, 2009) *cert. granted* 2010 WL 144074 (2010). These conflicting decisions illustrate that the preliminary injunction standards described in *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008) need further refinement to ensure that fundamental First Amendment rights are protected.

Since *Winter* addressed environmental interests, this Court did not have occasion to explain how the preliminary injunction standards should be applied when First Amendment rights are at stake. As the history of this case, as well as other First Amendment cases, illustrates, this Court's guidance on how to apply the preliminary

injunction standards in a way that protects free speech rights is urgently needed.

This Court's precedents establish that when First Amendment rights are at stake irreparable injury is a primary concern. Because First Amendment rights are so fundamental, a colorable claim of deprivation of those rights establishes irreparable injury. *See Elrod*, 427 U.S. at 373. That finding of irreparable injury, in turn should affect the weighing of the equities to increase the government's burden to justify its restraints. *See Ashcroft v. ACLU*, 542 U.S. 656, 670-671 (2004). The irreparable injury posed by First Amendment violations should also influence the analysis of whether an injunction is in the public interest, as the deprivation of a fundamental right is of significant consequence to the public. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

A final consideration in the First Amendment context should be preservation of the status quo ante. While preservation of the status quo has generally been subsumed into the balancing of the equities analysis, the unique status of First Amendment rights warrants a separate analysis of the concept. That analysis must take into account the unique position of the parties and seek to restore the status as it existed prior to the state's regulation of the plaintiff's speech.

A more speech-protective injunctive relief analysis will help ensure that the First

Amendment rights this Court has zealously guarded from governmental interference retain their status as fundamental rights. Such a standard should recognize that deprivation of First Amendment rights conclusively establishes irreparable injury, balance the equities with an eye on the irreparable nature of plaintiff's injury, measure public interest in light of the fundamental nature of free speech rights, and examine status quo from the perspective of status quo ante.

LEGAL ARGUMENT

In *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008), this Court emphasized that courts must engage in an exacting analysis of both the interests being threatened by state action and the interests underlying state action before determining whether a preliminary injunction is warranted. *Id.* at 375-376. Injunctive relief is an extraordinary remedy, and courts *must* balance the competing claims of injury and *must* consider how granting or withholding the requested relief will affect *each* party. *Id.* at 376 (emphasis added). The court must also pay particular attention to the public consequences of granting or denying an injunction. *Id.* at 376-377. In *Winter* this Court concluded that the Ninth Circuit had failed to give proper attention to the public consequences of restricting the Navy's sonar training exercises and had employed an overly lenient standard for finding irreparable injury. *Id.* at 375-376. The Ninth Circuit had downplayed the importance of national defense vis-à-vis the well-being of marine mammals. *Id.* at 377-378. The

injunction granted by the Ninth Circuit would have jeopardized national defense in order to preserve the plaintiffs' ability to observe and study marine mammals. *Id.* at 377-378. "[W]e see no basis for jeopardizing national security, as the present injunction does." *Id.* at 381.

Similarly, there can be no basis for jeopardizing the fundamental First Amendment rights of Washington voters in order to satisfy the curiosity of some seeking the identity those who supported placing Referendum 71 on the ballot. The parties who sought to identity those voters did so merely to confront those citizens regarding their views. Just as the Ninth Circuit downplayed the importance of national defense in *Winter*, it downplayed the importance of political speech and expressive association in this case. The Ninth Circuit's decision jeopardizes the free speech rights, and, in some cases, the personal safety, of petition signers in order to give third parties the ability to identify those who exercised their right to refer a law to the voters.

In *Winter*, this Court described the prevailing standard for a preliminary injunction. *Id.* at 374. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* This Court found that the Ninth Circuit employed a definition of irreparable injury that was too lenient and engaged in only a cursory review of the other

standards. *Id.* at 376-378. While the lenient irreparable injury standard was a concern in *Winters*, of greater significance was the lop-sided balancing of equities which failed to properly address the national security issue posed by the injunction. *Id.* Neither the threatened injury to plaintiffs nor the state interest involved deprivation of fundamental First Amendment rights, so this Court did not address how the presence of fundamental rights should affect the analysis.

This Court's long-standing protection of First Amendment rights as foundational to freedom provides guidance for a speech protective preliminary injunction standard. To properly protect fundamental First Amendment rights, a preliminary injunction analysis must begin with the premise that deprivation of free speech rights constitutes irreparable injury. That underlying premise should then form the basis for balancing the equities, tipping the balancing in favoring of avoiding irreparable injury. Recognizing that deprivation of First Amendment rights is irreparable injury should also form the basis for determining whether an injunction is in the public interest. Finally, the irreparable nature of depriving a party of First Amendment freedoms should also alter the question of protecting the status quo so that the emphasis is on protecting the status quo ante, *i.e.*, the status quo that existed before government restrictions on speech. Focusing first on the irreparable harm posed by threats to free speech rights places the proper emphasis upon the seriousness of the threat to fundamental rights

so that the remaining factors are viewed in the appropriate context.

I. THE STARTING POINT FOR ANY ANALYSIS OF A REQUEST FOR PRELIMINARY INJUNCTION IN THE FIRST AMENDMENT CONTEXT MUST BEGIN WITH THE PREMISE THAT DEPRIVATION OF FIRST AMENDMENT RIGHTS CONSTITUTES IRREPARABLE INJURY.

In *Winter* this Court rejected the Ninth Circuit's modified irreparable injury standard and reiterated that plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely in the absence of an injunction. *Id.* at 375. Under the Ninth Circuit's modified standard plaintiffs were only required to show probable success on the merits and the possibility of irreparable harm. *Earth Island Institute v. U.S. Forest Serv.* 442 F.3d 1147, 1158 (9th Cir. 2006) *abrogated in part, Winter,* 129 S.Ct. at 375. In *Winter*, the Ninth Circuit used that standard to find that plaintiffs' evidence of potential detrimental health effects in marine mammals was sufficient to support a preliminary injunction. *Id.* This Court rejected the standard as too lenient, noting that a preliminary injunction cannot be issued merely to prevent the possibility of some remote future injury. *Id.* The improper irreparable injury standard was not determinative however, as the Ninth Circuit's failure to properly assess the parties' respective interests in light of the government's (and public's)

significant interest in national security was sufficient to overturn the injunction. *Id.* at 376.

Integral to the *Winter* analysis was the fact that the plaintiffs did not allege a threat to personal fundamental rights, but to more general interests in environmental protection. *Id.* at 377-378. As this Court explained, the most serious possible injury to the plaintiffs in *Winter* would be harm to an unknown number of marine mammals that they study and observe. *Id.* at 378. On the other hand, forcing the Navy to deploy an inadequately trained anti-submarine force would jeopardize the safety of the fleet. *Id.* While the plaintiffs' threatened injuries might be serious and not redressable by money damages, they did not compare to the possible irreparable damage of a breach of national security. *See generally, id.*

By contrast, if the threatened harm to plaintiffs is restriction or prohibition of their individual right to express an opinion or support a cause, then the most serious possible injury is loss of personal freedoms guaranteed in the First Amendment. That significantly alters the preliminary injunction analysis and places greater importance on the issue of irreparable harm. The primacy of the rights guaranteed under the First Amendment means that irreparable harm must be the critical consideration in determining whether injunctive relief is warranted.

The purpose of the First Amendment includes the need to protect the free publication of matters of public concern, secure the right to a free

discussion of public events and enable every citizen to bring the government and governmental officials to the "court of public opinion" regarding their exercise of the duties entrusted to them. *Wood v. Georgia*, 370 U.S. 375, 392 (1962). "Political belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). Timing is of the essence in politics, as there is often only one chance to affect legislation or an upcoming election. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969). When an event occurs, it is often necessary to present a message promptly or lose the opportunity to present it at all. *Id.* A delay of even a day or two might be critical as it could affect whether the people will be afforded the opportunity to exercise their First Amendment freedoms effectively and intelligently. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968). The Bill of Rights was designed to "fence in the Government and make its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 72-73 (1963) (Douglas, J., concurring). Consequently, government action that threatens First Amendment freedoms is particularly egregious and must be taken seriously. *See Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938) (prevention of government restraint of free speech was a leading purpose behind adoption of the First Amendment).

Because threats to First Amendment freedoms are so serious, this Court has held that "[t]he loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. As the Eleventh Circuit observed, "[o]ne reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). Consequently, the court will find irreparable injury not only when a party demonstrates a current deprivation of rights, but also when he alleges that his freedom to exercise his right to petition will be chilled in the future or that the government is retaliating against him for having exercised his First Amendment freedoms in the past. *Id.* Similarly, when government employees demonstrate that they have been threatened with discharge if they do not support a certain political party or are supporting the political party to avoid discharge, they have shown that their First Amendment rights are threatened or impaired, which constitutes irreparable injury. *Elrod*, 427 U.S. at 373-374.

Elrod's oft-quoted standard for irreparable injury reflects this Court's long-standing recognition that First Amendment rights must be "carefully guarded" against infringement by public officials. *Id.* at 373; *see also, Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991). ("[O]ur historical commitment to expressive liberties dictates that "[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury"). "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties [of speech, religion and association] are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). Therefore, the First Amendment affords the broadest possible protection of these expressive rights "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). *Elrod*'s per se rule secures that protection by recognizing that rights lost to government restrictions cannot be regained and government officials cannot be permitted to downplay the effect of their restrictions on First Amendment rights.

Circuit courts have consistently followed *Elrod* in First Amendment cases to find irreparable injury in spite of government attempts to justify restrictions on speech. In *Paulsen*, the Second Circuit held that "[s]ince prohibitions on leafletting and dissemination of religious views contravene core First Amendment values," the plaintiffs established irreparable injury with their allegations that they were prevented from distributing religious leaflets at a county coliseum. *Paulsen*, 925 F.2d at 68. A faith-based student club denied recognition because of a school policy requiring all-inclusive membership was found to have alleged an irreparable injury because their right to express a particular belief was impaired,

regardless of the school's claim that state law required the restriction. *Christian Legal Society v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006). Similarly, a student who was told to remove a T-shirt containing a symbolic message was found to have alleged irreparable injury because his message was censored, despite school district claims that they were not suppressing the message, just the medium. *Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 254 (4th Cir. 2003). A citizen who was prohibited from placing leaflets on car windshields was found to have alleged irreparable injury because his right to engage in political discussion was impaired, despite the city's claim that the anti-leafletting ordinance was a reasonable restriction to prevent littering. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

The unique and fundamental nature of First Amendment rights, and this Court's commitment to zealous protection of those rights, dictate that irreparable injury be the initial and pre-eminent focus when analyzing claims for injunctive relief. Without a proper recognition of the irreparable nature of violations of First Amendment rights, injunctive relief will become meaningless to those battling government efforts to control, restrict or prohibit speech. The fleeting nature of political discourse means that relief cannot await a trial on the merits. Once lost, an opportunity to engage in free speech cannot be regained. By its very nature, therefore, improper restriction of First Amendment rights is an irreparable injury. Consequently, establishing that deprivation of First Amendment

rights constitutes irreparable injury provides the proper starting point for a speech protective preliminary injunction standard.

II. WHEN BALANCING THE EQUITES IN FIRST AMENDMENT CASES, THE IRREPARABLE INJURY POSED BY DEPRIVATION OF FUNDAMENTAL FIRST AMENDMENT RIGHTS MUST BE GIVEN CONSIDERABLE WEIGHT.

Any analysis of the "balancing of the equities" factor in First Amendment cases must begin with the language of the Amendment: "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. That language reflects the Founders' overall purpose that "the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting James Madison's report opposing the Alien and Sedition Act, cited in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION, 569-570 (1876)). Madison further said, "'[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.'" *Id.* (citing 4 ANNALS OF CONGRESS, 934 (1794)). Consequently, when the government imposes restrictions upon citizen's speech it is attempting to usurp the people's role as censor and undermine their sovereignty. That understanding is the lens through which a court should view the respective interests of the government and citizens

when presented with a request for a preliminary injunction in the First Amendment context. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Comm. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

When analyzing a request for a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376. In the First Amendment context, the court should measure the actual irreparable harm to the plaintiff if an injunction is denied against the potential harm to the government if the injunction is granted. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-429 (2006). When a government regulation substantially burdens a plaintiff's exercise of his First Amendment rights, then generalized governmental interests, such as preventing drug abuse, will not vitiate the plaintiffs' right to a preliminary injunction. *Id.* at 432.

The potential harms posed by speech-restrictive legislation can be so substantial that they even outweigh potential harms resulting from a preliminary injunction that might later be found to have been improvidently granted. *Ashcroft v. ACLU*, 542 U.S. 656, 670-671 (2004). When a statute, such as the Child Online Protection Act in *Ashcroft*, creates the possibility for criminal prosecution of expressive activity, then speakers might self-censor rather than risk going to trial

with an affirmative defense that the statute is unconstitutional. *Id.* That creates the potential for extraordinary harm and a serious chill upon protected speech. *Id.* at 671. By contrast, the harm to the state if an injunction remains in place pending trial is minimal, particularly if there are no prosecutions that will be disrupted while the injunction is in place. *Id.* Furthermore, the state could still enforce existing obscenity laws while the injunction was in place. *Id.*

Because First Amendment rights are so fundamental, this Court has consistently held that "'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.'" *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438, (1963)). Therefore, governmental action which might curtail those freedoms must be closely scrutinized when balancing the competing interests in preliminary injunctions involving First Amendment claims. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The asserted state interests must be sufficiently important and the restrictions closely drawn to avoid unnecessary abridgment of First Amendment freedoms. *Id.* In *Buckley*, the balance tipped in favor of the state in the case of campaign contribution limitations that "did not materially undermine the potential for robust and effective political discussion" and served the state interest in preventing corruption. *Id.* at 29. However, the state interests were not sufficient to justify campaign expenditure limitations that imposed "direct and substantial restraints on the quantity of

political speech." *Id.* at 39. The primary effect of the expenditure limits was to restrict the quantity of campaign speech and thereby limit political expression, which is "at the core of our electoral process and of First Amendment freedoms." *Id.* "The expenditure ceiling fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process while heavily burdening core 1st Amendment expression." *Id.* at 48. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. Requiring that a compelling state interest be present on the state's side of the equation ensures that citizens will not lose their fundamental rights to censorship disguised as public interest.

Furthermore, requiring that the state show a compelling interest in regulating speech in order to counterbalance demonstrated irreparable harm to First Amendment rights prevents government agencies from effectively denying free speech by delaying it. For example, a county steering committee that removed plaintiff as a member would have completed its work and foreclosed plaintiff from exercising her rights of free speech and association if plaintiff were not granted injunctive relief. *Starkey v. County Of San Diego* 346 Fed.Appx. 146, 148, (9th Cir. 2009). Plaintiff had demonstrated that the county's purported reasons for terminating her membership were a pretext for viewpoint discrimination. *Id.* Consequently, she had established irreparable

injury under *Elrod*. *Starkey*, 346 Fed.Appx. at 149. By contrast, the only harm that the county could identify from an injunction reinstating Plaintiff was additional time to address the issues plaintiff raised. *Id.* Weighed against the considerable First Amendment concerns that stem from excluding plaintiff from the steering committee, "this harm is negligible, and preliminary injunctive relief is warranted while the parties develop the record and proceed to a decision on the merits." *Id.*

Similarly, the Fourth Circuit found that any alleged harm that might befall the school district from an injunction precluding enforcement of a dress code regulation was negligible in light of the deprivation of First Amendment rights the plaintiff would suffer if the regulation were to continue to be used to censor his speech. *Newsom*, 354 F.3d at 261. A university's claim that it would suffer hardship if it had to recognize a student club which did not follow its anti-discrimination policy was similarly viewed as insufficient to forestall an injunction, particularly in light of the fact that the school's application of the policy to the plaintiff was likely unconstitutional. *Christian Legal Society*, 453 F.3d at 867. If that were found to be true, then the university's claimed harm would be "no harm at all." *Id.*

Government agencies should not be permitted to use mere facades of drug abuse prevention, crime prevention or other public interests to justify censorship or other deprivation of fundamental First Amendment rights. Requiring that state justifications for speech restrictive laws

be compelling and narrowly tailored properly recognizes the seriousness of restricting First Amendment freedoms and helps ensure that the state does not improperly assume the role of censor over the people. "Balancing of the equities" in the context of First Amendment claims should mean placing the plaintiff's irreparable harm on one side of the scale and the state's interests on the other. If the state's interests are not compelling and narrowly tailored, then the scale tips in favor of the plaintiff. If the state's interests are compelling, then the scale would be evenly balanced, and the court would look to other factors to determine if injunctive relief is warranted.

III. SINCE FIRST AMENDMENT RIGHTS ARE FUNDAMENTAL TO INDIVIDUAL FREEDOM, PROTECTING THOSE RIGHTS IS IN THE PUBLIC INTEREST.

Recognizing the extraordinary nature of a preliminary injunction, this Court has cautioned that when determining whether an injunction is warranted, courts should pay particular attention to the public consequences of granting or denying injunctive relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). That directive is even more critical when the extraordinary remedy of a preliminary injunction is coupled with the extraordinary rights protected by the First Amendment. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of

the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," and an error in marking that line "exacts an extraordinary cost." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (citing *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

Id. Consequently, in the First Amendment context, the question of whether an injunction is in the public interest is not merely an academic question and requires more than just a passing remark in the court's analysis.

While the public interest factor is sometimes subsumed into the balancing of the equities analysis, "it is better seen as an element that deserves separate attention in cases where the public interest may be affected," such as when First Amendment rights are threatened. *Sammartano v.*

First Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002). When analyzing public interest, the court primarily looks at whether and to what extent granting or denying an injunction will affect non-parties. *Id.* In *Sammartano*, the court found that injunctive relief was warranted because ongoing enforcement of potentially unconstitutional regulations at a city public safety complex would infringe not only the free expression interests of the plaintiffs, but also the interests of other people who might want to use the building. *Id.*

Courts have consistently followed the adage that "it is always in the public interest to prevent the violation of a party's constitutional rights" when determining whether a preliminary injunction should issue in a First Amendment case. *See G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). In a challenge to a city ordinance limiting campaign contributions and expenditures for mayoral candidates, the Tenth Circuit held that the public interest was best served by following this Court's precedent in *Buckley v. Valeo* and protecting the core First Amendment right of political expression. *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001). Similarly, the Eighth Circuit found that the public interest was best served by enjoining enforcement of Iowa statutes regulating expenditures expressly advocating for the election or defeat of a candidate. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 966 (8th Cir. 1999). The court found that the statutes posed great potential harm to independent expression, and the public interest favors protecting core First

Amendment freedoms, so injunctive relief was appropriate. *Id.* at 970. The Eleventh Circuit held that the strong public interest in protecting First Amendment values favored granting an injunction against state court proceedings aimed at penalizing the plaintiff's prior exercise of his right to petition. *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983). Framing its conclusion a little differently, the Sixth Circuit found that "there is no public interest in enforcing a law that curtails debate and discussion regarding issues of political import," so that the public interest favored an injunction against a law limiting campaign expenditures. *Suster v. Marshall*, 149 F.3d 523, 533 (6th Cir. 1998) *cert. denied*, 525 U.S. 1114 (1999).

This Court's instruction to pay particular attention to the public consequences of granting or denying injunctive relief, *Weinberger*, 456 U.S. at 312, is of particular import in First Amendment cases. The consequences of granting or denying an injunction based upon First Amendment rights will necessarily extend well beyond the parties in a pending case. Third parties who might not even be aware of a pending challenge to a regulation but are subject to it will be affected by the decision to grant or deny injunctive relief. The public interest in granting or denying a preliminary injunction is always part of the court's analysis. However, in the First Amendment context, the public interest is critical to ensuring that injunctive relief is providently granted. This Court should adopt a speech-protective standard that emphasizes the importance of the public interest in First Amendment challenges.

IV. A SPEECH PROTECTIVE STANDARD FOR PRELIMINARY INJUNCTIONS SHOULD SEPARATELY ADDRESS PRESERVATION OF THE STATUS QUO ANTE TO ENSURE THAT SPEECH RIGHTS ARE PRESERVED AS THEY EXISTED BEFORE GOVERNMENT REGULATION.

Because government restriction on free speech rights can have such grave consequences, it is important that the question of preservation of the status quo also be given particular attention in a speech-protective preliminary injunction analysis. The question of preservation of the status quo is frequently subsumed into the balancing of the equities analysis, but the risk posed by an improper interpretation of the concept requires that it be addressed separately when determining whether a preliminary injunction should be granted in the First Amendment context. When examining the question of preservation of the status quo in free speech cases, it is critical to recognize that the appropriate inquiry is not necessarily the status at the time of filing but the status quo ante, *i.e.*, the status of the parties before speech was restricted.

This Court has long recognized that when constitutional rights are at stake, the party whose rights are affected need not endure a regulatory restriction until its constitutionality is determined. *Banton v. Belt Line Ry. Corp.*, 286 U.S. 413, 417 (1925) (citing *Love v. Atchison, T. & S. F. Ry. Co.* 185 F. 321, 326 (8th Cir. 1911)). "[I]n truth, the purpose and effect of these injunctions were to

restore and maintain the status which existed before the unconstitutional acts of the people and the officers of Oklahoma disturbed that status, and thereby to prevent the irreparable injury which the companies must otherwise have suffered during the pendency of these suits." *Love*, 185 F. at 331-332. As the Eighth Circuit later clarified, "[t]he usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Brotherhood of Railroad Carmen of America, Local No. 429 v. Chicago and North Western Ry Co.*, 354 F.2d 786, 799 (8th Cir. 1965). "The status quo is the last uncontested status which preceded the pending controversy." *Minnesota Mining and Mfg. Co. v. Meter*, 385 F.2d 265, 273 (8th Cir. 1967).

As the Fifth Circuit explained, "[i]t is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo." *Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974). However, there is no "particular magic in the phrase 'status quo.'" *Id.*

> The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as

> to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Id.

The Fifth Circuit's observations are particularly apropos in First Amendment cases. Generally, a plaintiff who is challenging a government regulation as an infringement of free speech is being subjected to the regulation at the time that he seeks judicial relief. *See e.g., Sammartano,* 303 F.3d 974 (plaintiff being prevented from engaging in expressive activity in public building); *Newsom,* 354 F.3d at 261 (student's speech being censored by school policy). Subjecting his expressive activities to the regulation is causing him irreparable harm by depriving him of his First Amendment rights. Preserving the status quo at the time of the lawsuit would mean preserving a status of irreparable injury. In order to prevent irreparable injury, the focus must be on preserving the status quo as it existed before the regulation affected plaintiff's expressive activities. Therefore, when determining whether a preliminary injunction is appropriate in the First Amendment context, the relevant inquiry

must be not whether it is appropriate to preserve the existing status of the parties, but whether it is appropriate to restore the parties to the status they enjoyed before the government attempted to regulate plaintiff's speech. Adopting this standard will help ensure that the court properly analyzes the true effect of the proposed injunction on the parties' relative interests.

CONCLUSION

This Court has long established that governmental attempts to restrict, control or squelch First Amendment rights must be subjected to exacting scrutiny. That concept should be applied to requests for preliminary injunctions aimed at enjoining governmental restrictions on free speech. Applying the free speech protections to preliminary injunction review should mean adopting a standard in which deprivation of free speech rights constitutes irreparable injury and that irreparable injury is the basis for balancing the equities, determining public interest and evaluating the status quo ante.

The Ninth Circuit failed to utilize such a standard and failed to accord the plaintiffs' First Amendment rights the consideration required when fundamental rights are threatened. Liberty Counsel respectfully asks this Court to reverse the

Ninth Circuit's ruling and to adopt a speech-protective standard for preliminary injunction analysis.

March 4, 2010

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AMICUS CURIAE BRIEF

No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, ET AL., PETITIONERS

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL., RESPONDENTS

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MASSACHUSETTS GAY AND LESBIAN POLITICAL CAUCUS AND SUSAN WAGNER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Massachusetts Gay and Lesbian Political Caucus ("MGLPC") is a nonprofit organization dedicated to the principles of equality and liberty embodied in the United States Constitution and the Massachusetts Constitution and Declaration of Rights. Since its founding in 1973, MGLPC has educated and organized citizens of the Commonwealth of Massachusetts to protect and advance the civil rights of lesbians and gay men through effective participation in the legislative and political process. MGLPC's activities have included participating in direct voter initiative processes similar to the referendum process at issue in this case. Of particular relevance to this case, in 2001 and 2002 MGLPC co-chairs Arline Isaacson and Gary Daffin spearheaded a campaign to educate Massachusetts citizens about an initiative petition known as the Protection of Marriage Amendment. In the course of that campaign -- and because of public access to the names of signatories to the petition -- MGLPC uncovered and alerted the public to numerous instances of fraud and deception committed by paid petition signature gatherers.

Susan Wagner is a New York resident who serves as the President of Equine Advocates and is a long-time advocate for the humane treatment of horses. From 2001 to 2002, Ms. Wagner chaired Save Our Horses, a Massachusetts ballot question

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[1] This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than amici and their counsel made such a monetary contribution

committee. Save Our Horses' mission was to enact through the Massachusetts initiative process Brown Beauty's Bill, legislation that would ban the killing of horses in Massachusetts for human consumption either within or outside the state. Save Our Horses was victimized by widespread fraud and deception in the 2001 signature gathering process and as a consequence was deemed to have failed to gather the number of signatures required for placement of its initiative on the 2002 ballot.

MGLPC and Ms. Wagner respectfully submit that their respective experiences with fraud in the initiative process and the role that public access to petition signatures played in discovering that fraud and in notifying victims may be of assistance to the Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

The Petitioners in this case claim that the First Amendment grants a right of anonymity to those who sign referendum petitions. In other contexts, when deciding whether the First Amendment implicitly grants protections necessary to the enjoyment of other rights expressly stated in the First Amendment, this Court has considered the tests of experience and logic, *i.e.*, whether recognizing a First Amendment right (a) is consistent with historical tradition; and (b) will play a positive role in the functioning of the governmental process at issue. *See generally Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980). Neither consideration supports the constitutional right of anonymity asserted by the Petitioners.

The history of direct democracy measures is one of openness. The historical predecessor to the referendum and initiative processes was the right of instruction, a popular democratic measure often employed by the Founders. Nothing about the instruction process was anonymous. Instructions were debated and voted on in public town meetings. The process was fully transparent; supporters and opponents were well-known to the community. As town meetings became less frequent, instructions were replaced by the initiative and referendum processes. But the openness that was so characteristic of the right of instruction remained, with petitions distributed, discussed, debated and signed in public fora such as streets, shopping centers, parks and parking lots. The public nature of the referendum and initiative processes therefore carries the favorable judgment of history.

Openness also plays a significant, positive role in the functioning of the referendum and initiative processes. As a general matter, openness is consistent with the First Amendment's core purpose of assuring freedom of communication on matters relating to official governmental functions such as the formal initiation and approval of legislation. Moreover, as the experience of the amici in Massachusetts demonstrates, openness plays an essential role in ensuring that the public has the means to serve as a watchdog over the referendum and initiative processes, safeguarding against fraudulent and deceptive practices that would otherwise go undetected. In short, neither experience or logic supports the Petitioners' claim that the First Amendment imposes a constitutional requirement of anonymity on the referendum or initiative processes.

ARGUMENT

I. PUBLIC ACCESS TO THE NAMES OF PETITION SIGNATORIES IS NOT PROHIBITED BY THE FIRST AMENDMENT AND, TO THE CONTRARY, PROMOTES IMPORTANT FIRST AMENDMENT INTERESTS

The Petitioners claim that the First Amendment grants a constitutional right of anonymity to citizens who sign referendum petitions. This argument surely is not compelled by the text of the First Amendment, which prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment is, of course, "broad enough to encompass those rights that, while not

unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). As Justice Brennan once cautioned, however, because the "stretch of [any such] protection is theoretically endless," judicial analysis of such claims requires "discrimination and temperance." *Richmond Newspaper*, 448 U.S. at 588 (Brennan, J., concurring) (quoting William J. Brennan, Jr., *Address*, 32 RUTGERS L. REV. 173, 177 (1979)) (internal quotations omitted).

The Court has applied these principles of "discrimination and temperance" when deciding the analogous issue of whether the First Amendment provides the public with a right of access to criminal proceedings. Under the constitutional analysis employed by the Court, the First Amendment provides such a right where (a) there exists a historical tradition of public access to the proceeding; and (b) public access plays a positive role in the functioning of the specific proceeding at issue. *Globe Newspaper*, 457 U.S. at 605-06; *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-09 (1984) ("*Press-Enterprise I*").

Both considerations -- experience and logic -- are critical to sound constitutional analysis and are appropriately considered in this case to evaluate the Petitioners' claim of a First Amendment right to anonymity. Historical tradition commands respect because "the Constitution carries the gloss of history," and because tradition "implies the favorable judgment of experience." *Richmond Newspaper*, 448 U.S. at 589 (Brennan, J., concurring). *See generally*

In re Winship, 397 U.S. 358, 361-62 (1970) (historical practice reflects a "profound judgment about the way in which law should be enforced and justice administered" (internal quotations and citation omitted)). Similarly, it is necessary to closely examine whether recognizing a First Amendment right of anonymity will play a positive role in the functioning of the specific process at issue in order to prevent "rhetorical statements" about the sweep of First Amendment protections from dictating constitutional results. *Richmond Newspaper*, 448 U.S. at 589 (Brennan, J., concurring).

As shown below, applying this two-part test to Petitioners' claims demonstrates that signatories to referendum petitions have no First Amendment right to anonymity. First, there is no historical tradition of anonymity with regard to petition signatories. To the contrary, the historical evidence indicates that there is a tradition of public accessibility to such information. Second, as the experience of MGLPC and Ms. Wagner vividly demonstrates, public access to the names of signatories plays a positive role in the functioning of the petition process by preventing fraud and promoting the integrity of the process. In contrast, if adopted, the Petitioners' position would have the effect of "limiting the stock of information from which members of the public may draw" in connection with the initiative process, thereby contravening the Amendment's "common core purpose" of "assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspaper*, 448 U.S. at 575. *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[A] major purpose of that Amendment was to protect the free discussion of governmental

affairs"). For these reasons, amici respectfully submit that the First Amendment does not provide a constitutional right of anonymity to signatories of referendum or initiative petitions.

II. PETITION SIGNATORIES HISTORICALLY WERE NOT ANONYMOUS

Washington State's referendum process, like similar procedures in numerous other states, is an attempt to balance the constitutional conflict between principles of republicanism and principles of direct democracy that has existed since even before the Revolutionary War. *See* Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 178, 180 (Henry G. Bohn ed. 1841) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."); *see also* Letter from John Adams to J.B. Varnum (Dec. 26, 1808), *in* 9 THE WORKS OF JOHN ADAMS 604, 605 (Charles F. Adams ed., 1854) ("The right of the people to instruct their representatives, is very dear to them, and will never be disputed by me.").

Modern direct democracy measures most commonly take the form of either a referendum petition or an initiative petition. A referendum authorizes voters to either ratify or reject a law already enacted by the legislature. An initiative authorizes voters to approve either a proposed law or a proposed constitutional amendment not yet acted upon by the legislature. Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 358 (1991). *See generally* ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 434 (1930).

The historical predecessor to the referendum and the initiative is the right of instruction, historically viewed by some as a binding command by the people to their representatives and by others as a non-binding exhortation. Bresler, *supra*, at 374-84. All three mechanisms -- the referendum, the initiative and the right of instruction -- share a history of openness that directly undermines the Petitioners' constitutional claims of anonymity.

A. The Historically Public Nature of the Instruction Process

Instructions to legislators have been a feature of American government almost since its inception. Town records show that as early as 1653, citizens publicly assembled in town meetings to propose, debate, and vote to accept or reject instructions to the town's deputies in the General Court. *See* SECOND REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON: CONTAINING THE BOSTON RECORDS, 1634-1660, AND THE BOOK OF POSSESSIONS 114 (2d ed. 1881). These instructions covered a wide variety of legislative matters including education, morality, political conduct, agriculture, trade and commerce, and taxation. LUCE, *supra*, at 449. By the time the colonies won their independence, towns assembled as frequently as several times a year to debate and vote instructions. *See* Letter from John Adams to the President of Congress (June 2, 1780), *in* 7 THE WORKS OF JOHN ADAMS, *supra*, at 180, 182.

The process of voting instructions in town meetings established a precedent for the modern initiative and referendum process. *See* DAVID SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3-4 (1991) ("Since the seventeenth century, voters in hundreds of New England towns have exer-

cised their lawmaking powers in annual town meetings, using a method similar to the Initiative: citizens place . . . questions on the agenda by petition, meet and discuss the proposals, and then vote to accept or reject them."); M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 3 (2003) ("These town hall meetings established the precedent which led to the creation of the legislative referendum process . . . ."). Although they differ in some ways, instructions, initiatives and referenda all are part of the same democratic tradition. *See* Bresler, *supra*, at 358 (comparing questions of instruction, characterized as direct republicanism, with initiatives and referenda, characterized as direct democracy); Kenneth Colegrove, *New England Town Mandates*, *in* 21 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 411, 423 (1920) (stating that the one difference between the colonial practice of voting instructions and the modern initiative is that "[o]ur Puritan forefathers in town-meetings did not as a rule draw up the exact wording of the new laws which they demanded").

In this tradition, the identities of those initiating popular legislative action and representing popular opinion have been known to the public. A historical review of the instruction process during the colonial and revolutionary periods demonstrates this fact. The process began when the town's selectmen, by their own authority or upon petition by any seven townspeople, issued a warrant for the calling of a town meeting. Letter from John Adams to Abbé De Mably (1782), *in* 5 THE WORKS OF JOHN ADAMS, *supra*, at 492, 495 (1851); *see also* I WILLIAM GORDON, HISTORY OF THE RISE, PROGRESS, AND ESTABLISHMENT OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA 382 (1788). At the meeting, if the mo-

tion to instruct passed, the townspeople would appoint a committee to draw up the instructions. Colegrove, *supra*, at 420. Once the instructions were drawn, the committee would report them to the assembly, "and this report was debated by the town--not infrequently for several days." *Id.* at 417. These debates involved face-to-face, open discussions by all who wished to address the assembly. As one historian recounts,

> [O]ftentimes, the substance of the instructions will evoke a sharp debate, and the simple freeman will thus hear the affairs of the town and of the commonwealth discussed by the keenest of wits of the province; while, if his boldness gets the better of his prudence, he will attempt to gain the floor to express his own sentiments on the question before the meeting.

Id. at 420-21; *accord* GORDON, *supra*, at 382 (stating that at town meetings, "[e]ach individual has an equal liberty of delivering his opinion, and is not liable to be silenced or browbeaten by a richer or greater townsman than himself."); Letter from John Adams to the President of Congress, *supra*, at 182 ("In these assemblies, every man, high and low, every yeoman, tradesman, and even day-laborer, as well as every gentleman and public magistrate, had a right to vote, and to speak his sentiments upon public affairs, to propose measures and to instruct the representatives."). "As a rule, free-speech seems to have dominated the assemblies." Colegrove, *supra*, at 417. Contrary to the Petitioners' view of public disclosure as a burden on political speech, our predecessors viewed the public, non-anonymous

process of voting instructions to legislators as the quintessence of free political speech.

Popular support for instructions historically was garnered in public places, just as today's petition signatures generally are solicited and gathered in public venues such as sidewalks or even social networking websites. Town meetings in Boston, for instance, famously took place at Faneuil Hall throughout the revolutionary era. Meanwhile, the townspeople of New York assembled in an open field on the day they instructed their representatives in the General Court to boycott the importation of British goods. *See* Resolutions Adopted by the Meeting in the Fields (July 6, 1774), *in* 1 AMERICAN ARCHIVES, FOURTH SERIES 1669, at 312-13 (Peter Force ed., 1846); *see id.* at 312 (listing the names of those voting in favor and against the appointment of a committee to draw up such instructions). On the eve of the American Revolution, the people of James City, Virginia met in the town tavern, Allen's Ordinary, to instruct their representatives "to exert [their] utmost abilities, in the next Convention, towards dissolving the connection between *America* and *Great Britain*, totally, finally, and irrevocably." Instructions from the Freeholders of James City County to Their Delegates (Apr. 24, 1776), *in* 5 AMERICAN ARCHIVES, *supra*, at 1046-47. In these open venues, no supporters of town instructions reasonably could believe that their participation in the process was confidential.

The identities of the committee members who drew up the instructions were not only known to the public generally but were recorded in the town records and occasionally printed in the town newspaper along with a copy of the instructions. For example, in 1765, an enthusiastic assembly in Faneuil

Hall voted to instruct the town's deputies to oppose the passage of the Stamp Act. *See* A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE BOSTON TOWN RECORDS, 1758 TO 1769, at 155-56 (1886). The corresponding town meeting minutes record that the town had appointed Samuel Wells, Richard Dana, John Rowe, Samuel Adams, John Erving, Joseph Green, and John Ruddock to the committee that drew up the instructions. *See id.* at 152. Just as petitions today enjoy "no promise of confidentiality" from the State once they are submitted, *Doe v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009), instructions in the past were not sent to representatives "in a private letter, which can be put in their pockets." Statement of Rufus King Before the Massachusetts Convention (Jan. 19, 1788), *in* 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 47 (Jonathan Elliot ed., 2d ed. 1888). Historically, town instructions were "public instructions, which all the country will see." *Id.* And indeed, Boston's Stamp Act instructions were published in the *Boston Gazette* on September 23, 1765, for all to see.

The historically public nature of the instruction process is vividly illustrated by one of the most famous instructions in the history of the Commonwealth. In 1779, a committee appointed by the town of Pittsfield in Berkshire County drafted instructions for their representative in the State Convention insisting on the adoption of a state constitution as a condition to permitting the highest court of the then-existing government to sit in Berkshire County. The document, credited with achieving the calling of the convention that led to the adoption of the Massachusetts Constitution, was known to be drafted by Thomas Allen of Pittsfield. J.E.A. SMITH, THE HISTORY OF PITTSFIELD (BERKSHIRE COUNTY) MASSACHUSETTS

FROM THE YEAR 1734 TO THE YEAR 1800, at 365-68 (1869); Frank W. Grinnell, *Note on the Legal Effect of the Popular Vote on the Rearrangement*, 7 MASS. L.Q., No. 1, 180, 181-82 (1921). According to one commentator, it is "probable that the existence of the Massachusetts Constitution owes as much to Thomas Allen as an initiative force as it owes to John Adams and Theophilus Parsons, as draftsmen and constructive thinkers." Frank W. Grinnell, Speech Before the Maryland State Bar Association (July 1, 1921), *in* 7 MASS. L.Q., No. 1, app. at 9 (1921). Just as the drafter and supporters of the instructions were known to the public, however, so too were those citizens who opposed holding the courts hostage to the calling of a constitutional convention:

> And, as usually happens in acrimonious political conflicts, each party grossly misrepresented and maligned the other. On the one hand, although among those who favored a recognition of the obnoxious government, and the admission of the courts, there were some of the truest patriots in Berkshire, on whom not the shadow of suspicion of treachery to the American cause could justly have rested, yet they were indiscriminately posted in the public prints, and charged by the public action of the towns, as "enemies of their country," in precisely the same phraseology that was used concerning the Tories. One not acquainted with the facts would infer from the record, that Capt. Charles Goodrich, for example, was, in the opinion of his townsmen, false to the Revolutionary cause; while, in fact, it had no more sincere supporter.

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> So effectually, indeed, did the newspaper libellers affix this stigma to the rejection of civil administration in Berkshire, that it has not even yet been removed.

J.E.A. SMITH, *supra*, at 370, 371. Anonymity, in short, was not a historical attribute of the instruction process.

By the time of independence, the practice of voting instructions in New England town meetings was a century and a half old. Reflecting on the Revolution, John Adams declared that "[t]he consequences of these [town meetings] have been, that the inhabitants, hav[e] acquired from their infancy the habit of discussing, of deliberating, and of judging public affairs," and that "it was in these assemblies of towns or districts that the sentiments of the people were formed in the first place, and their resolutions were taken from the beginning to the end of the disputes and the war with Great Britain." Letter from John Adams to Abbé De Mably, *supra*, at 495. At the federal level, until the Seventeenth Amendment to the Constitution instituted direct popular election of Senators in 1913, state legislators regularly gave instructions to their Senators that were recorded in public votes. Bresler, *supra*, at 365.

B. The Public Nature of the Modern Initiative and Referendum Process

In Massachusetts, as in other states, the constituent instruction ultimately gave way to the modern initiative and referendum. In 1915, the people of Massachusetts voted on the following question of instruction: "Shall the Representative from this District be instructed to support the Initiative and Ref-

erendum, so as to give the Voters the Power to accept or reject at the Polls, Measures that have been proposed by Petition?" MASS. OFFICE OF THE SECRETARY OF STATE, NUMBER OF ASSESSED POLLS, REGISTERED VOTERS AND PERSONS WHO VOTED IN EACH VOTING PRECINCT AT THE STATE, CITY AND TOWN ELECTIONS 512 (1915). The following year, the state legislature passed, and the voters approved, a bill authorizing a constitutional convention to consider various reforms, of which the most intensely debated was the initiative and referendum amendment.

When, in 1917, the Massachusetts Constitutional Convention debated the initiative and referendum amendment, proponents advocated for the initiative and referendum as a substitute for its precursor, the town meeting, whose preeminence waned with the end of town sovereignty. Delegate E. Gerry Brown of Brockton declared that "[b]ecause the town-meeting has dropped out [of the state constitution] we present the principle of the initiative and referendum to take its place." 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917-1918, at 417 (1918).

Unlike the right of instruction, the initiative and referendum processes did not include the open, face-to-face town meeting debates that triggered the formulation and delivery of instructions. *Id.* at 12 ("The open, oral discussion of measures . . . is of the essence of the town-meeting, of the Constitutional Convention, of all legislating bodies. But the most important features of a true debate are missing in, and are rendered impossible by, the initiative, and there is no remedy for this lack."). As a result, some members of the Massachusetts Constitutional Convention expressed concern that signature gathering

would be susceptible to abuse and would not accurately reflect public opinion. Delegate Henry T. Lummus of Lynn stated,

> If I were to try to put my finger on the most vital defect in the proposed plan I should put it on the provision permitting the circulation of petitions and the employment of paid canvassers. Most of the practical abuses of the initiative result from that. . . . "The number of signatures does not, even in the absence of fraud . . . give any true indication of public opinion in regard to the measures submitted."

Id. at 136 (second alteration in original) (quoting the testimony of Professor Barnett, Chair of Government at the State University of Oregon, before the Oregon legislature).

Although the initiative and referendum processes in Massachusetts lack the public town meetings that accompanied the instruction process, the processes are by no means confidential. For example, the identities of petition signatories are disclosed to third parties no less than five times during the initiative or referendum process:

1. Petitions typically are signed in public places such as shopping center parking lots and public streets, with the signatories in plain view of friends and strangers.

2. When one person signs a petition, the names and addresses of persons who previously signed on the same page of the petition are readily visible.

3. The referendum or initiative committees -- political partisans -- and paid signature gatherers who are otherwise total strangers to the issue being petitioned, collect all signed petitions and thus have access to the names and addresses of all signatories. Further, ballot question committees often photocopy signed petitions to retain names of potential supporters for use in future campaigns.

4. Signed petitions must be submitted to the registrars of the city or town where the signers appear to be voters (a process that does not include verifying the authenticity of the signatures). *See* MASS. GEN. LAWS ch. 53, § 7.

5. Signed petitions must also be submitted to the Secretary of State's Office, which reviews the petitions "for extraneous markings and compliance with exact copy requirements," and to "determine the total number of certified signatures" (but not to verify the authenticity of the signatures). 950 MASS. CODE REGS. § 48.07; *see also id.* at §§ 48.06, 48.07(2); App. 33a ("The Secretary does not make a review of individual signatures.").

In addition, the names of signatories are publicly available under the Massachusetts Public Records Law, MASS. GEN. LAWS ch. 66, § 10. As Massachusetts has learned all too well, such public access to initiative and referendum petition signatures is as crucial to the integrity of these citizen-lawmaking processes as the open town meeting was to the process of approving constituent instructions.

III. PUBLIC ACCESS TO NAMES OF PETITION SIGNATORIES PLAYS A POSITIVE ROLE IN THE FUNCTIONING OF THE REFERENDUM AND INITIATIVE PROCESSES BY PROMOTING THE DETECTION AND PREVENTION OF FRAUD

The need for public access to the names of petition signatories in order to uncover and prevent fraud is not an academic matter to MGLPC or Ms. Wagner. As described below, although not aligned politically, MGLPC and Ms. Wagner each had personal experience with the effect of ballot fraud. Without public access to the names of petition signatories, the amici would not have been able to prove that fraud had occurred, nor would they have been able to alert the public and elected officials to this threat to the electoral process. As Massachusetts's 2001 experience with signature gathering demonstrates, public access to the names of purported petition signers is nothing short of imperative to maintaining the integrity of the citizen initiative process.

A. Brown Beauty's Bill and the Protection of Marriage Amendment

Pursuant to the procedures set forth in Article 48 of the Massachusetts Constitution, in 2001 several Massachusetts entities commenced the process of placing initiative petitions on the ballot. *See* MASS. CONST. art. 48, pt. 2, § 3. Among these organizations were Massachusetts Citizens for Marriage ("MCM"), Save Our Horses and the Committee for Small Government.

MCM was a ballot question committee formed "for the purpose of passing an amendment, known as

the Protection of Marriage Amendment, to the state Constitution." Compl. for Decl. Relief at ¶ 1, *Pawlick v. New York Times Co.*, CA No. 03-10704 PBS (D. Mass. Jan. 2, 2003).[2] The Protection of Marriage Amendment (the "Marriage Petition"), also referred to as Petition E, defined marriage exclusively as the union of one man and one woman, and prohibited alternative forms of relationship recognition for same-sex couples. A wholly unrelated ballot question committee, Save Our Horses and its Chair, Susan Wagner, sought placement on the ballot and ultimate passage of Brown Beauty's Bill, A Ballot Initiative to Ban the Slaughter of Massachusetts Horses for Human Consumption. Also known as the Horse Slaughter Petition or Petition A, Save Our Horses' initiative prohibited the otherwise lawful slaughter or humane killing of horses if such slaughter or killing was for use as food for human consumption. Another unrelated ballot question committee, the Committee for Small Government, advocated placement on the ballot and passage of the Initiative to End the Income Tax (the "Tax Petition").

As required by Article 48, Brown Beauty's Bill, the Marriage Petition and the Tax Petition were "signed by ten qualified voters of the Commonwealth" and submitted to the Attorney General in early August 2001. *See* MASS. CONST. art. 48, pt. 2, § 3. The Attorney General subsequently certified these petitions, which were filed with the Secretary

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[2] Amici cite documents filed in *Arkuss v. Galvin*, CA No. 02-1318 A (Suffolk Mass Super Ct.) and *Pawlick v. New York Times Co.*, CA No. 03-10704 (D. Mass.) These cases, of which the Court may take judicial notice, concerned issues arising from Save Our Horses' and MCM's 2001-2002 efforts to advance their respective initiative petitions.

of the Commonwealth in early September 2001. *See id.*

B. MGLPC Uncovered Alarming Fraud and Deception in the Signature Gathering Process

Having obtained preliminary certification, MCM, Save Our Horses and the Committee for Small Government had until November 21, 2001 to gather the 57,100 signatures required to place their initiatives on the ballot. *See* MASS. CONST. art. 48, pt. 2, § 3; *id.*, pt. 4, § 2 (requiring that a petition to amend the Constitution be signed "in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election"); *id.*, pt. 5, § 1 (imposing the same requirement for petitions to enact statutes); App. 23a. Each committee separately hired Ballot Access Company to gather the requisite signatures. The company's workers simultaneously gathered signatures for all three petitions at the same locations, increasing the potential for confusion and mischief.

The committees paid Ballot Access Company on a per signature basis, with Save Our Horses executing a contract on September 12, 2001 to pay the company $1.70 for each signature collected. App. 23a. Signature collectors hired by Ballot Access Company were paid per signature and were compensated more for signatures on the Marriage Petition than those on Brown Beauty's Bill, a disparity with the potential to incentivize fraud. App. 21a. The incentive to commit fraud increased when the Committee for Small Government terminated its relationship with Ballot Access Company part way through

the signature gathering process, thus decreasing the signature gatherers' sources of revenue.

Throughout the 2001 signature gathering period, MGLPC spearheaded a Decline To Sign campaign. MGLPC led this campaign as a founding member of MassEquality: The Campaign for Equality ("MassEquality"), then a newly-formed voluntary coalition of Massachusetts organizations working to advance marriage equality in the Commonwealth. The Decline to Sign campaign aimed to dissuade individuals from signing the Marriage Petition. Focusing on locations where paid signature gatherers worked, staff and volunteers trained by MGLPC stood outside shopping malls, grocery stores, and other public places. When a member of the public appeared willing to sign the petition, a Decline to Sign campaigner would politely ask that person not to sign and would explain the principles of equality and fairness animating the request. Campaigners were courteous, friendly and peaceful in their discussions with members of the public.

In the process of executing the Decline to Sign campaign, MGLPC and its coalition partners witnessed signature gatherers for the Marriage Petition engaging in bait and switch tactics and other fraudulent and deceptive conduct in order to obtain signatures from unwitting Massachusetts citizens. For example, some signature gatherers used clipboards covered by a copy of Brown Beauty's Bill petition and a picture of a horse colored in red, white and blue, but had signature pages for the Marriage Petition hidden under that façade to be signed by unsuspecting citizens.

Individuals not associated with MGLPC corroborated MGLPC's findings of fraud and deception. Ac-

cording to Jason Hampton, a signature gatherer paid by Ballot Access Company, "it was much easier to get people to sign Petition A than Petition E. Petition A was so popular that I made my own color copies of the American flag horse picture to attract people to the table." App. 20a; *see also* App. 25a ("Ballot Access Company had instructed its signature gatherers to 'sell' voters on signing Petition A but trick them into signing Petition E instead."). Mr. Hampton recalled Ballot Access Company providing him and other signature gatherers with "pre-prepared clipboards that had a picture of a horse colored like the American flag on the top, a copy of Petition A underneath that, and then a mix of Petition A and Petition E signature pages on the bottom." App. 19a. According to Mr. Hampton, Ballot Access Company "said we should show people Petition A, but if they weren't paying attention to have them sign on one of the petitions underneath, most of which were Petition E." *Id.*

The Secretary of State's Office received multiple complaints regarding such trickery. According to Michelle Tassinari, Legal Counsel for the Secretary's Elections Division, "[t]he allegations have been similar in that voters are being solicited to sign 'Petition A' (prohibiting the slaughter of horses) and then provided with 'Petition E' (relating to the marriage question)." Steve LeBlanc, Associated Press, *Activists Say Voters Were Tricked Into Signing Gay Marriage Question*, Dec. 18, 2001. In addition, MGLPC and Save Our Horses notified the Attorney General and Secretary of State of the fraud they had discovered.

Recognizing the gravity of the situation, the Attorney General issued a news release on November

16, 2001 captioned "**ATTORNEY GENERAL CAUTIONS VOTERS: BE CAREFUL IN SIGNING BALLOT QUESTION PETITIONS.**" According to the release:

> The Attorney General's Office has received several complaints about deceptive practices by some people gathering signatures on certain initiative petitions. Voters said they have been asked to sign a petition for a law to ban the slaughter of horses for human consumption, but when they indicated they wanted to sign that petition, they said they were given another, different petition to sign -- one that proposes a constitutional amendment stating that only the union of one man and one woman shall be recognized as a marriage in Massachusetts.
>
> After receiving those complaints this week, the Attorney General's Office did some spot checks which revealed that some voters may have signed a petition they did not support.

App. 29a; *see also* Pam Belluck, *Drive to Ban Gay Marriage is Accused of Duping Signers*, N.Y TIMES, Apr. 7, 2002, § 1 (quoting Ann Donlan, a spokeswoman for the Attorney General's Office, stating "[w]e found that there were some irregularities and that people may have signed a petition they didn't want to sign").

The revelation of this fraud did not halt the initiative process. At the conclusion of the signature gathering period, Save Our Horses and MCM sub-

mitted signed petition forms for "certification" by local registrars of voters. This "certification" consists of matching the names of petition signatures with names on the voter rolls of the registrar's district. *See* MASS. GEN. LAWS ch. 53, § 7. There is no requirement to verify either that the signature is authentic or that the signature appears on the petition the signatory intended to support. *See id.*

Individuals from Save Our Horses and MCM also were responsible for retrieving their petitions from the registrars and submitting them to the Secretary of State. *See* MASS. CONST. art. 48, pt. 2, § 3 ("the remainder of the required signatures shall be filed not later than the first Wednesday of the following December"); 950 MASS. CODE REGS. § 48.06(5). The Secretary was then obligated to review the petitions "for extraneous markings and compliance with exact copy requirements," and to "determine the total number of certified signatures." 950 MASS. CODE REGS. § 48.07. The Secretary of State's review, like the registrars' "certification," does not include verifying the authenticity of the signatures or any other effort to detect fraud or error in the signature collection process. *See id.* at §§ 48.06, 48.07(2).

By letter dated December 20, 2001, the Secretary of the Commonwealth informed Neil Arkuss, the first signatory to Brown Beauty's Bill, that the petition "had received only 54,526 allowable signatures out of the 57,100 required to qualify for the ballot." App. 25a. Despite a subsequent lawsuit brought by Mr. Arkuss and six Massachusetts voters who intended to sign the bill but instead were duped into signing the Marriage Petition, the Secretary declined to transmit Brown Beauty's Bill to the Clerk of the House of Representatives and the initiative petition

died. The Marriage Petition, in contrast, was certified for transmission to the Clerk of the House of Representatives, the next step in the initiative process. *See id.*; MASS. CONST. art. 48, pt. 2, § 4.

C. Public Access to the Names of Petition Signatories was Necessary to Uncover and Disseminate Information About the Fraud that Tainted the 2001-2002 Initiative Process

Although for different political reasons, MGLPC and Save Our Horses were deeply concerned by the fraud and trickery that led people to unknowingly sign the Marriage Petition, often at the expense of Brown Beauty's Bill. *See* Stephanie Ebbert, *Accusations Swirl On Petition Tactics*, BOSTON GLOBE, Jan. 9, 2002, at B1 ("Now, defenders of both animal rights and gay rights are challenging the fates of the disparate initiatives, saying the signature gathering company misled citizens into putting their names on the gay marriage ban when they thought they were signing the petition against horse slaughter."). As recognized by the Secretary of State, "the only way to make [a demonstration of deception in the signature gathering process] – because of the fundamental presumption that each signature appearing on a petition is valid – is 'one signature at a time.'" Def.'s Opp. to Pls.' Mtn. for Prelim. Inj. at 2, *Arkuss v. Galvin*, CA No. 02-1318 A (Suffolk Super. Ct. Apr. 17, 2002); *see also* App. 34a ("the only way to ultimately determine whether an individual truly did not sign the Horse Petition is to review the actual petitions that were submitted to the Secretary"). Because neither Save Our Horses or MGLPC and its coalition partners, acting alone or in combination with one another, had the time, substantial financial

resources, and handwriting expertise to compare the tens of thousands of petition signatures with those on the voter registration cards on file in each of the cities and towns in Massachusetts, the groups set out to empower the citizens of Massachusetts to determine whether their signatures were stolen.

MGLPC and Save Our Horses first lawfully obtained signatures pursuant to the Massachusetts Public Records Law, MASS. GEN. LAWS ch. 66, § 10. *See also* 950 MASS. CODE REGS. § 48.08 (providing that "'[i]n no event shall state ballot question petitions be open for public inspection until the Secretary has provided the first ten signers with a final official count of the number of certified signatures"). MGLPC then coordinated an effort to place the names of purported petition signers on a MassEquality website, created by Amy Hunt with the technical assistance of Sarah Bennett. The names of all petition signers also were posted on the website of Save Our Horses. App. 26a. To the best of amici's knowledge, this was the first time in the nation that the names of signatures on an initiative petition were posted on the Internet. Posting the names of purported petition signers allowed interested citizens to determine easily and inexpensively whether their names appeared on petitions they in fact intended to sign. The publication of names found on the two petitions likewise allowed Save Our Horses and MGLPC to utilize the feedback of concerned citizens in ascertaining the scope of the deception perpetrated against supporters of Brown Beauty's Bill. Via the websites, Save Our Horses and MGLPC and its coalition partners received numerous submissions from frustrated and upset individuals stating that their names appeared on the Marriage Petition despite having intended to sign only Brown Beauty's

Bill. *See, e.g.*, App. 11a-17a. But for the public provision of the names associated with each petition, Massachusetts citizens would be left with no realistic way to determine whether they had been duped in the signature gathering process.

Additionally, beginning on February 21, 2002 and continuing through March 23, 2002, Save Our Horses, with MGLPC's assistance, mailed letters to 28,051 individuals listed as signers of the Marriage Petition but not Brown Beauty's Bill. App. 27a. The mailing informed these individuals that their names appeared on the Marriage Petition and asked whether they "intend[ed] to sign that petition (Petition E) or . . . Petition A, banning the slaughter of Massachusetts horses for human consumption." App. 12a. The letter requested: "If your name appears on the wrong petition, please fill out the form below and return to us immediately in the enclosed self-addressed stamped envelope." *Id.* By April 10, 2002, Save Our Horses "received written responses from over 1,000 voters residing in all parts of Massachusetts, stating that they had intended to sign only Petition A but were not listed as signers of Petition A, and that they had not intended to sign Petition E but were listed as signers of Petition E." App. 27a-28a; *see also, e.g.*, App. 11a-15a; App. 1a-2a ("Someone asked me to sign an initiative petition on the slaughter of Massachusetts horses, and I signed. No one said anything about an initiative petition on marriage. Months later I received a form letter from Save Our Horses. The letter said my name appeared on Petition E, the marriage initiative. I filled in the form to say I did not intend to sign the marriage petition and did not know why my name appeared there, and that I intended to sign only Petition A, the horse slaughter initiative.").

These outreach efforts, along with media reports, brought to light numerous fraudulent and deceptive tactics employed by signature gatherers in the Fall of 2001. Many individuals reported that signature gatherers showed them a clipboard containing the Brown Beauty's Bill petition but then turned that page and covered the words at the top of the next page while the individuals signed. *See* App. 4a; Aff. of Bethany Hughes in Supp. of Pls.' Mtn. for Prelim. Inj. at ¶¶ 4-5, *Arkuss v. Galvin*, CA No. 02-1318 A (Suffolk Super. Ct. Apr. 9, 2002) (Man who asked affiant to "sign an initiative petition against horse slaughter . . . had model horses and signs with pictures of horses. He only mentioned horse slaughter. . . . He kept hold of the clipboard and would not let me hold it. He kept the top part of the clipboard covered with a picture of a horse. He flipped through the pages on the clipboard to a page where he said I should sign, and I signed there."). While it is customary for signature gatherers to direct a signer to the appropriate page for her city or town, in this case voters were directed to an entirely different petition, a fraudulent bait and switch. *See* Aff. of Janet Drake in Supp. of Pls.' Mtn. for Prelim. Inj. at ¶¶ 6-8, *Arkuss v. Galvin*, CA No. 02-1318 A (Suffolk Super. Ct. Apr. 9, 2002) (explaining similar tactic and her discovery of the bait and switch when she demanded that she be allowed to hold the clipboard).

In addition to reported instances of bait and switch victimization, other petition signatories stated that although they explicitly declined to sign the Marriage Petition, they had learned via MGLPC's and Save Our Horses' outreach that their signatures nevertheless appeared on that petition. App. 7a. Some reported that although they signed only Brown Beauty's Bill or the Marriage Petition

their names somehow appeared on both petitions. App. 16a. Still others said their names appeared on the Marriage Petition despite not having signed *any* petition. App. 17a. And others reported being told by signature gatherers that the Marriage Petition was in fact a petition that would allow same-sex couples to marry, or of being instructed to sign Brown Beauty's Bill in two places and then learning via the MassEquality website that their name appeared on both petitions, or of being told that if they signed one petition they were required to sign all three.

Acting on behalf of MGLPC and its coalition partners, Amy Hunt, Sarah Bennett and William Conley followed up with individual interviews of voters who reported that their signatures wrongly appeared on the Marriage Petition. MGLPC then discussed these reports with Massachusetts legislators, *see, e.g.*, App. 35a-39a, whose action would ultimately be required before the Protection of Marriage Amendment would reach the 2004 ballot, *see* MASS. CONST. art. 48, pt. 4, §§ 4-5. During a day-long hearing on the initiative before the Legislature's Joint Committee on Public Service, numerous Massachusetts citizens testified regarding the forgery and deception associated with the 2001 signature gathering process. In its majority report opposing the Marriage Petition, the Committee referenced "concerns about the manner in which signatures were gathered for this ballot initiative" that "call[ed] into question the fairness and legitimacy of the process itself." COMMONWEALTH OF MASS. JOINT COMM. ON PUB. SERV., SB 2335, 2001-2002 Sess. (Apr. 24, 2002) (at App. 40a-42a).

Without public access to the names appearing on the petitions, citizens of Massachusetts and the Commonwealth's legislators would have remained in the dark about the serious questions of fairness and due process concerning the initiative process.[3] Indeed, absent public access to this information, individual citizens would not even be able to determine whether their signatures were correctly listed on petitions or whether they were victims of identity fraud.

This problem is not unique to Massachusetts. As stated in a recent report by the Ballot Initiative Strategy Center:

> Since most states do not devote the time and resources necessary to fully review every signature qualifying a ballot initiative, the public should have timely access to all petition sheets after they have been submitted for verification instead of solely relying on a sample. The Secretary of State should also have a responsibility to release copies of signature petitions to the public in a timely manner to allow citizen groups to examine signatures submitted and monitor for fraud to ensure than an ini-

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[3] By way of additional example, in 1998 a petition to cut the Massachusetts state income tax would have reached the ballot with only eighty-one signatures more than required, if a coalition led by the Massachusetts Teachers Association and the Tax Equity Alliance for Massachusetts had not combed through the petition papers and notified the Secretary of State that it found scores of "legally dubious voter signatures." Frank Phillips, *Coalition Challenges State Tax-Cut Petition*, BOSTON GLOBE, Dec. 31, 1997, at A1.

> tiative which fraudulently gathered signatures does not qualify for the ballot. . . . By requiring more accountability for signature gathering vendors and the circulators they hire, the public will be better able to support election officials in their efforts to protect the integrity of the initiative process and voters will be more confident that initiatives qualified in a way consistent with state law.

BALLOT INITIATIVE STRATEGY CENTER, BALLOT INTEGRITY: A BROKEN SYSTEM IN NEED OF SOLUTIONS (July 2009); *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 383 (1995) (Scalia, J., dissenting) ("It is not unheard-of for campaign operatives to circulate material over the name of their opponents or their opponents' supporters (a violation of election laws) in order to attract or alienate certain interest groups. *See, e.g.*, B. FELKNOR, POLITICAL MISCHIEF: SMEAR, SABOTAGE, AND REFORM IN U.S. ELECTIONS 111-12 (1992) (fake United Mine Workers' newspaper assembled by the National Republican Congressional Committee); *New York v. Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (Sup. 1974) (letters purporting to be from the "Action Committee for the Liberal Party" sent by Republicans).").[4]

The findings of the Ballot Initiative Strategy Center and the 2001-2002 Massachusetts experience

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[4] Unlike *McIntyre*, of course, this case does not present the issue of whether the First Amendment protects anonymous leafleting. The petition process is part of an official governmental process, not an act of political leafleting, and there is no tradition of anonymity with respect to petition signatories.

demonstrate that public access to the names appearing on ballot initiatives plays a significant positive role in the functioning of the process by permitting citizen groups and members of the public to serve as watchdogs of the initiative process. Secretaries of State and other governmental entities simply lack the time and resources required either to verify the authenticity of every signature on every initiative petition or to determine whether voters were provided with the petition they intended to sign. Without the ability of organizations such as MGLPC and Save Our Horses to attempt to verify the authenticity and intent of petition signers, there is no realistic check on the legitimacy of the signature gathering process and no workable way for citizens to know if their signatures have been stolen in an attempt to put an initiative on the ballot. If fraud and deception such as that perpetrated in Massachusetts are not brought to light, the petition process would surrender its fundamental purpose as an authentic voice of the people.

In sum, the Petitioners' claim that the First Amendment provides petition signatories with a constitutional right to anonymity flies in the face of the core purpose of the First Amendment -- to protect the informed discussion of government affairs. Stated another way, the Petitioners have no right to deprive other citizens of their constitutional right to inform themselves of and petition the government with evidence of voter fraud in the petition process, yet that is an inevitable result of the Petitioners' position. Employing the tests of experience and logic used by the Court in analogous contexts demonstrates that there is no historical tradition of anonymity afforded to petition signatories and that public access to the names of signatories plays a positive

role in the functioning of the petition process. For all of these reasons, the First Amendment does not provide petition signatories with a constitutional right to anonymity.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

JONATHAN M. ALBANO
Counsel of Record
LAURA K. LANGLEY
DEANA K. EL-MALLAWANY
BINGHAM MCCUTCHEN, LLP
One Federal Street
Boston, MA 02110
jonathan.albano@bingham.com
(617) 951-8000

Counsel for Amici Curiae

April 1, 2010

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF MARIE COE

State of Massachusetts)
County of Berkshire) ss.

Marie Coe, having been duly sworn, deposes and states:

1. I have personal knowledge of the matters stated in this Affidavit.

2. I am registered to vote in Pittsfield, Berkshire County, Massachusetts.

3. I signed a single ballot initiative petition one day in the Fall of 2001. I was at the Stop & Shop store on Merrel Road in Pittsfield.

4. Someone asked me to sign an initiative petition on the slaughter of Massachusetts horses, and I signed. No one said anything about an initiative petition on marriage.

5. Months later I received a form letter from Save Our Horses. The letter said my name appeared on Petition E, the marriage initiative. I filled in the form to say I did not intend to sign the marriage petition and did not know why my name appeared there, and that I intended to sign only Petition A, the horse slaughter initiative. I mailed the form back to Save The Horses.

6. I resent the fact that I was deceived by the petitioner into signing Petition E on marriage when I thought I was signing Petition A on horse slaughter.

Signed under the pains and penalties of perjury this 9th day of April, 2002.

/s/ Marie Coe
Marie Coe

Sworn to before me on April 9, 2002.

/s/ [Illegible]
Notary Public
My Commission Expires: May 15, 2005

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF ANITA CONSTANTINE-GAY

State of Massachusetts)
County of Plymouth) ss.

Anita Constantine-Gay, having been duly sworn, deposes and states:

1. I have personal knowledge of the matters stated in this Affidavit.

2. I am registered to vote in Hingham, Plymouth County, Massachusetts.

3. I signed a single ballot initiative petition in late 2001 while I was waiting for my bus at the Quincy Center Station.

4. A young black man with a missing tooth followed me as I walked toward the spot for my bus, talking about horses being sold and killed for meat

He was carrying a clipboard with petitions. I saw the heading "Save The Horses" on the top page on the clipboard. I agreed to sign the petition.

5. Instead of giving me the clipboard, the man turned it to face me. He turned to the next page, even though the signature lines on the first page were not all filled. He held the clipboard with his thumb or fingers covering the words at the top of the page. I was about to ask to see the hidden words when my bus arrived. I quickly signed the petition and hurried to board my bus.

6. Later, I saw an article in the Boston Globe about petitioners using the horse slaughter petition to trick people into signing a different initiative petition relating to marriage.

7. After seeing the newspaper article, I received a form letter from Save Our Horses. I checked the spaces on the form to show I intended to sign the Horse Petition "A" only and did not intend to sign the Marriage Petition ("E") and did not know why my name appeared on it

8. I called both the Massachusetts Attorney General's office and the Secretary of the Commonwealth's office to report what had happened to me. The person at the Attorney General's office told me to call the office of Secretary Galvin. The young man I spoke with at the Secretary's office was very rude and snotty. He said he did not consider what had been done to me to be a criminal thing. He also said that if I was stupid enough to sign something when I did not know what it was it was my own fault.

Signed under the pains and penalties of perjury this 5th day of April, 2002.

/s/ Anita Constantine-Gay
Anita Constantine-Gay

Sworn to before me on April 5 , 2002.

/s/ Barbara M. Springsteen
Notary Public
My Commission Expires: July 9, 2004

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF RICHARD LEEMAN

State of Massachusetts)
County of Norfolk) ss.

Richard Leeman, having been duly sworn, deposes and states:

1. I have personal knowledge of the matters stated in this Affidavit.

2. I am registered to vote in Braintree, Norfolk County, Massachusetts.

3. I signed a single ballot initiative petition in late 2001 while I was on my way into the local Stop & Shop store.

4. A man in his 40's or 50's asked me to sign an initiative petition about horse slaughter. I said yes, and signed what I thought was the horse slaughter petition. The petition was on a clipboard the man was holding. I saw only one clipboard.

5. After I signed, the man asked me to sign a petition about marriage. I told him no and walked away.

6. Many weeks later, I received a form letter from Save Our Horses. I checked a [illegible] on the form to show I intended to sign the Horse Petition "A" only. I checked another space on the form to indicate that I did not intend to sign the Marriage Petition ("E") and did not know why my name appeared on it. I then mailed the form back to Save Our Horses.

7. It is important for me that the initiative to prohibit slaughter of horses for human consumption should appear on the ballot.

Signed under the pain's and penalties of perjury this 11th day of April, 2002.

/s/ Richard Leeman
Richard Leeman

Sworn to before me on April 11, 2002.

/s/ [Illegible]
Notary Public
My Commission Expires: 01/22/2004

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 03-10704 PBS

SARAH MCVAY PAWLICK and
MASSACHUSETTS CITIZENS FOR MARRIAGE,
Plaintiffs,

v.

THE NEW YORK TIMES COMPANY,
Defendant.

AFFIDAVIT OF TERRY KLEIN IN SUPPORT OF (I) DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; AND (II) DEFENDANT'S SPECIAL MOTION TO DISMISS

I, Terry Klein, depose and state as follows:

1. I am an attorney with the firm of Bingham McCutchen LLC, counsel to the New York Times Company in this action.

2. Attached hereto as *Exhibit A* are certified corporate filings of the Globe Newspaper Company, Inc. and related entities that are on file with the Secretary of the Commonwealth of Massachusetts.

3. Attached hereto as *Exhibit B* is a true copy of a News Release issued by the Attorney General of Massachusetts entitled "Attorney General Cautions Voters: Be Careful in Signing Ballot Questions," dated November 16, 2001. (A copy of the News

Release also is available at the Attorney General's web site, http://www.ago.ma.us/pressrel/ballots.asp).

4. Attached hereto as *Exhibit C* is a Certification signed under the penalties of perjury by Assistant Attorney General Peter Sacks attaching materials submitted by representatives of an organization calling itself "Save Our Horses" both (i) via electronic mail to the Secretary of the Commonwealth of Massachusetts; and (ii) during a meeting with the representatives of the Attorney General's Office and the Elections Division of the Office of the Secretary of the Commonwealth on March 14, 2002.

5. Attached hereto as *Exhibit D* is a certified copy of the amended complaint filed by the plaintiffs in Suffolk Superior Court in the civil action entitled *Neil P. Arkuss, et al. v. William Francis Galvin*, Suffolk Superior Court Civil Action No. 02-1318-A.

6. Attached hereto as *Exhibit E* is a certified copy of the letter sent from the Massachusetts Citizens for Marriage to Secretary of the Commonwealth of Massachusetts, dated April 4, 2002.

7. Attached hereto as *Exhibit F* is a copy of an article published by The New York Times on April 7, 2002, under the headline "Drive to Ban Gay Marriage is Accused of Duping Signers."

8. Attached hereto as *Exhibit G* is a certified copy of the complaint filed in the Supreme Judicial Court by one of the plaintiffs in a civil action entitled *Sarah McVay Pawlick v. Thomas Birmingham and Secretary of the Commonwealth*, SJC No. 2002-0354.

9. Attached hereto as *Exhibit H* is a certified copy of the complaint filed in the Supreme Judicial Court by the plaintiffs in a civil action entitled

Massachusetts Citizens for Marriage and *Sarah McVay Pawlick v. Secretary of the Commonwealth*, SJC No. 08966.

10. Attached hereto as *Exhibit I* are true copies of articles appearing in the Boston Globe that are cited in ¶¶ 15(a) - 15(r) of the plaintiffs' complaint in this action.

Signed under the penalties of perjury this 20th day of June 2003

/s/ Terry Klein
Terry Klein

APPENDIX E

CERTIFICATION

I certify under the penalties of perjury that attached hereto are true and accurate copies of the following documents:

1. An electronic mail mesage forwarded to me on November 16, 2002, by Michelle Tassinari, Esq., legal counsel to the Elections Division of the Office of the Secretary of the Commonwealth of Massachusetts; and

2. Materials submitted to the Office of the Attorney General by Susan Wagner, of the organization calling itself "Save Our Horses," and her counsel, Lowell Finley, Esq., at a meeting between those individuals and representatives of the Office of the Attorney General (including myself) and of the Elections Division of the Office of the Secretary of the Commonwealth, on March 14, 2002. The materials were separated with labeled, tabbed dividers, copies of which are included in the appropriate places.

/s/ Peter Sacks
Peter Sacks
Assistant Attorney General

Date: June 16, 2003

As subscribed and sworn to before me on June 16, 2003.

/s/ Dena Elise Barisano, Notary Public
Dena Elise Barisano

My commission expires: April 11, 2008

SAVE OUR HORSES

Unit 284, 1257 Worcester Road
Framingham, MA 01701 (617) 363-2644
www.saveourhorses.com
E-mail info@saveourhorses.com
Susan Wagner, Ballot Committee Chair

Dear Massachusetts Voter:

During the fall 2001 petition drive, signatures were gathered for initiatives for the 2002 Massachusetts ballot and for an amendment to the State Constitution for the 2004 ballot. **YOUR NAME appears on Petition E which bans domestic partner benefits and other protections for same sex couples, known as the so-called "Marriage" Petition** (2004 ballot). Did you intend to sign that petition (Petition E) or did you intend to sign **Petition A, banning the slaughter of Massachusetts horses for human consumption?** If your name appears on the wrong petition, please fill out the form below and return to us immediately in the enclosed self-addressed stamped envelope.

Your swift response is vital to an investigation in determining the legitimacy of the initiative signature-gathering process during the 2001 petition drive. **The Horse initiative** (for the 2002 ballot) **depends on it.**

Sincerely,

/s/ Susan Wagner
Susan Wagner

Susan Wagner, Chair, Save Our Horses

(To check your name on the public record for both petitions, visit www.saveourhorses.com)

✂.....**Cut here and please mail immediately**.....✂

CHECK ALL THAT APPLY:

✓ **I intended to sign the Horse Petition "A" only.**

✓ **I did not intend to sign the so-called "Marriage" Petition ("E") and don't know why my name appears there.**

_ **I intended to sign both petitions "A" and "E"**

PLEASE PRINT VERY CLEARLY:

First Name: Pamela Last Name: Boucher

Address: REDACTED

City/Town REDACTED Zip REDACTED

Telephone: Redacted (Optional) E-Mail: Redacted

OPTIONAL COMMENTS: Is there anything about your interaction with the petitioner that you'd like to tell us about? Please name the town and location, if possible. (Use the back if necessary)_____

_____

SAVE OUR HORSES

Unit 284, 1257 Worcester Road
Framingham, MA 01701 (617) 363-2644
www.saveourhorses.com
E-mail info@saveourhorses.com
Susan Wagner, Ballot Committee Chair

Dear Massachusetts Voter:

During the fall 2001 petition drive, signatures were gathered for initiatives for the 2002 Massachusetts ballot and for an amendment to the State Constitution for the 2004 ballot. **YOUR NAME appears on Petition E which bans domestic partner benefits and other protections for same sex couples, known as the so-called "Marriage" Petition** (2004 ballot). Did you intend to sign that petition (Petition E) or did you intend to sign **Petition A, banning the slaughter of Massachusetts horses for human consumption?** If your name appears on the wrong petition, please fill out the form below and return to us immediately in the enclosed self-addressed stamped envelope.

Your swift response is vital to an investigation in determining the legitimacy of the initiative signature-gathering process during the 2001 petition drive. **The Horse initiative** (for the 2002 ballot) **depends on it.**

Sincerely,

/s/ Susan Wagner
Susan Wagner

Susan Wagner, Chair, Save Our Horses
(To check your name on the public record for both petitions, visit www.saveourhorses.com)

✂.....Cut here and please mail immediately.....✂

CHECK ALL THAT APPLY:

✓ **I intended to sign the Horse Petition "A" only.**

✓ **I did not intend to sign the so-called "Marriage" Petition ("E") and don't know why my name appears there.**

__ **I intended to sign both petitions "A" and "E"**

PLEASE PRINT VERY CLEARLY:

First Name: NICHOLAS Last Name: ANGELOS

Address: REDACTED

City/Town REDACTED Zip REDACTED

Telephone: 978 475-0436 (Optional) E-Mail:

OPTIONAL COMMENTS: Is there anything about your interaction with the petitioner that you'd like to tell us about? Please name the town and location, if possible. (Use the back if necessary)

SUSAN WAGNER

From: <saveourhorses@mindspring.com>
To: <saveourhorses@mindspring.com>
Sent: Monday, January 28, 2002 5:25 PM
Subject: We've received your report. Thank you!

The following information was submitted through the site

First Name: Danielle
Last Name: Borenstein
E-mail: imagine@alumni.brandeis.edu
Street Address: REDACTED
City:
Zip Code:
Day Phone: (617) 787-4996
Evening Phone: same

Problem: My name appears on the lists of both A and E, but I only signed the Horse Petition A.

Coments: There was nothing suspicious about the signature gatherer. I signed the petition outside the vegetarian food festival in Roxbury. I can say that my husband signed the petition the same day and his name didn't wind up on E, just A. Somehow I'm on both.

SUSAN WAGNER

From: <saveourhorses@mindspring.com>
To: <saveourhorses@mindspring.com>
Sent: Tuesday, February 26, 2002 10:09 PM
Subject We've received your report. Thank you!

The following information was submitted through the site

First Name: theresa
Last Name: caputo
E-mail: wilddog71@hotmail.com
Street Address: REDACTED
City:
Zip Code:
Day Phone:
Evening Phone:

Problem: I found my name listed on the so-called Marriage Petition E—and it shouldn't be!

Coments: To: Ms. Susan Wagner, I want you people to know that I, Theresa Caputo, received this letter in the mail on 2/26/02 concerning that my signature was written on one of these petition. I DID NOT sign any petition regarding petition "E" or petition "A" and please remove my name from any of these petitions for they are fraudulent. I am very upset about this that my name appeared on these petitions. Please notify me that my name has been removed from these two petitions. Thank you for my concern.

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF JASON HAMPTON IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Jason Hampton, being duly sworn, do say and depose as follows:

1. I am over the age of 18, not a party to this proceeding, and a resident of Lynn, Massachusetts.

2. I have personal knowledge of the facts recited herein.

3. For about 10 days immediately before Thanksgiving, 2001, I worked out of the Labor Ready office in Lynn, Massachusetts, collecting signatures on initiative petitions for the Ballot Access Company.

4. From the first day I worked for Labor Ready, collecting signatures for the Ballot Access Company, through November 21, 2001, the same handwritten message was on the whiteboard in the Labor Ready office. The message said that 100 people were needed

every day until Thanksgiving to collect signatures on petitions.

5. My first day working on the Ballot Access Company job, I collected signatures on only one petition, which was Petition E, the Marriage Amendment. I worked at Shaw's, near the North Shore Mall shopping center in Peabody. It was hard to get signatures. Many people said they opposed Petition E and argued with me about it.

6. On the second day and every day up to Thanksgiving, I collected signatures on both Petition A, the Horse Slaughter initiative, and on Petition E.

7. On the morning of the second day, a tall heavyset black man named Randy Morrison who said he worked for the Ballot Access Company, gave instructions to a group of us at the Labor Ready office on how to collect signatures. Derrick Lee, a white man in his thirties who said he was the President of the Ballot Access Company, was in the room the whole time.

8. Randy Morrison said it was easier to get signatures for the horse petition than the marriage petition. He told us to talk about the horse slaughter issue to "sell" people on signing Petition A. He gave us pre-prepared clipboards that had a picture of a horse colored like the American flag on the top, a copy of Petition A underneath that, and then a mix of Petition A and Petition E signature pages on the bottom. He said we should show people Petition A, but if they weren't paying attention to have them sign on one of the petitions underneath, most of which were Petition E. Ballot Access had prepared these clipboards so that there would be a mixture of the two, but most of them Petition E, with Petition A on top always

9. I did not follow Randy Morrison's instructions and try to slip anyone the Marriage petition, or Petition E, when they said they wanted to sign Brown Beauty's Bill, or Petition A. It seemed to be illegal and it just didn't seem right to try to trick people.

10. Because I had a truck, I served as a driver, taking other people hired at Labor Ready to various places in several other shopping malls where they would collect signatures.

11. Each day, Randy Morrison gave me a set of clipboards to hand out to each of the people riding in my truck. Every day, the clipboards he gave me had been set up the same way. Each one had a flyer with the color American flag horse picture on the top, a copy of Petition A under that, and then a mixture of A and E petitions underneath. I gave the clipboards out to the people riding in my truck.

12. Compared to my experience the first day circulating only Petition E, it was much easier to get people to sign Petition A than Petition E. Petition A was so popular that I made my own color copies of the American flag horse picture to attract people to the table.

13. One day a Hispanic woman who worked behind the counter in the Labor Ready office told me that she thought Petition A was just a front being used to collect signatures for Petition E.

14. Labor Ready charges companies a certain amount per hour for its workers. Labor Ready then pays the workers less than that amount for each hour they work. Someone from the company using the workers is supposed to sign off on time slips that show how many hours each person worked. We give those to Labor Ready, and Labor Ready writes us a check.

15. At the end of every day, Randy Morrison would check the petitions we brought in at the Labor Ready office. Derrick Lee was there while Randy did this. Randy would often say some of the sheets were no good because they had stray marks. Even though we were supposed to be paid for every hour we worked, Randy would write down less hours on someone's time slip if they didn't have very many signatures or if he said a lot of them were no good.

16. After Randy Morrison finished, Derrick Lee would sign the time slips and give them to the person behind the counter at Labor Ready.

17. Besides the other people hired from Labor Ready, I met four or five other men who said they flew to Massachusetts with Derrick Lee from Arizona to collect signatures. I saw them all staying together in the same room, Room 1, at the Carriage House in Lynn. They said they had collected petition signatures for Derrick Lee in Arizona and other states. They told me Derrick Lee was paying them by the signature, and they were getting a lot more for Petition E signatures than Petition A signatures.

Signed under the pains and penalties of perjury this_____day of April, 2002.

/s/ Jason Hampton
Jason Hampton

Sworn to before me on April 3, 2002

/s/ Illegible
Notary Public
My Commission Expires: 4/3/02

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF SUSAN WAGNER

State of New York)
County of Queens) ss.

Susan Wagner, having been duly sworn, deposes and states:

1. I have personal knowledge of the matters stated in this Affidavit.

2. I am the Chair of Save Our Horses, the Massachusetts ballot question committee that is the sponsor of Petition A, "Brown Beauty's Bill, A 2002 Ballot Initiative to Ban the Slaughter of Massachusetts Horses for Human Consumption." A true and correct copy of Petition A, containing the Attorney General's summary of the proposed law, I s attached hereto as Exhibit A.

3. In September of 2001, I executed on behalf of Save Our Horses a written contract with the Ballot

Access Company, LLC for collection of signatures of Massachusetts registered voters on Petition A. A true and correct copy of the contract is attached hereto as Exhibit B. In the contract, Save Our Horses agreed to pay the Ballot Access Company $1.70 for each signature collected on Petition A. The Ballot Access Company agreed to collect at least 90,000 signatures on the petition.

4. The period in which Save Our Horses needed to collect at least 57,100 certifiable signatures of registered voters on Petition A if it was to qualify for the November 2002 ballot ran from the last week in September through the third week in November, 2001.

5. During the first week of October, 2001, I began to receive reports that signature gatherers working for the Ballot Access Company were simultaneously collecting signatures on Petition E, the so-called "Marriage Amendment." The Ballot Access Company had not disclosed to Save Our Horses during the negotiation of the contract that the company would simultaneously be circulating this other ballot question petition.

6. I found the reports about the Ballot Access Company's involvement with Petition E very troubling. I had seen press accounts indicating that Petition E was controversial with Massachusetts voters. I was concerned that by asking voters to sign Petition E, Ballot Access Company signature gatherers would drive away many Massachusetts voters who would otherwise sign Petition A.

7. Numerous people contacted Save Our Horses who said they had been asked to sign both petitions by the same person. These people told me that while they supported our ballot question, they would not

sign Petition A so long as the people carrying our petition were also carrying (and misrepresenting) Petition E, which these voters strongly opposed.

8. I phoned Derrick Lee, the owner of the Ballot Access Company, to register my concern. He acknowledged that his company was also collecting signatures on Petition E. He said that the sponsors of Petition E were paying more for each signature on Petition E than Save Our Horses was paying for signatures on Petition A. He also stated that opponents of Petition E were trying to prevent people from signing Petition E. I told him that carrying Petition E constituted a breach of his contract with Save Our Horses. I demanded that he stop his signature gatherers from carrying or soliciting signatures on Petition A and Petition E at the same time.

9. In e-mail messages dated October 6th and 13th, 2001, Derrick Lee declined to stop his signature gatherers from carrying or soliciting signatures on Petition A and Petition E at the same time. He said that some of his signature gatherers would continue to carry both petitions, but that they would pull Petition E off the table if there was any controversy about it at a signature gathering site. He also said that he would have one group of signature gatherers carrying only Petition E, the marriage petition.

10. Weeks went by, but I continued to receive reports of signature gatherers soliciting signatures for both Petition A and Petition E at sites where there was controversy over Petition E. I also began to receive more disturbing reports that signature gatherers were drawing people in by talking about the horse slaughter issue on Petition A, then tricking the people into signing Petition E when they said they wanted to sign Petition A.

11. On Friday, November 16, 2001, I received by fax from Peter Sacks of the Attorney General's office a copy of a news release issued by that office, bearing the same date. A true and correct copy of the news release, with the heading "ATTORNEY GENERAL CAUTIONS VOTERS: BE CAREFUL IN SIGNING BALLOT QUESTION PETITIONS," is attached hereto as Exhibit C. Based on "spot checks" conducted by the office, the Attorney General's news release included the following statement: "People gathering signatures may have deceptively placed a stack of petitions on a clipboard so that the petition on top, which is shown to voters to read, deals with one issue (such as the slaughter of horses), but the petitions underneath, which are given to voters to sign, may deal with a separate issue (such as marriage)."

12. On November 17, 2001, Derrick Lee told me that his signature gatherers had stopped carrying the marriage petition, Petition E. He said they would not gather any additional signatures for it until the signature drive for Petition A, the horse slaughter petition, was completely over, which would be the following weekend.

13. I was not informed until months later that the Ballot Access Company had instructed its signature gatherers to "sell" voters on signing Petition A but trick them into signing Petition E instead. I never requested, condoned, agreed to, or acquiesced in such deception of voters.

14. Attached hereto as Exh. D is a true and correct copy of a letter dated December 20, 2001 from the office of the Secretary of the Commonwealth, concluding that Petition A had received only 54,526 allowable signatures out of the 57,100 required to qualify for the ballot.

15. Attached hereto as Exh. E is a true and correct copy of a letter dated December 20, 2001 from the office of the Secretary of the Commonwealth, concluding that Petition E had received 76,607 allowable signatures.

16. After we received in late December 2001 the Secretary of the Commonwealth's determination that Petition A had failed to qualify for the ballot, a volunteer attorney for Save Our Horses agreed to contact the attorney for Massachusetts Citizens for Marriage ("MCM"), the sponsor of Petition E, to request information concerning MCM's dealings with the Ballot Access Company. Attached hereto as Exhibits F and G, respectively, are copies of the letters from the Save Our Horses attorney to the MCM attorney, dated January 9, 2002, and the MCM attorney's reply, dated January 23, 2002, in which they refused to cooperate.

17. During January 2002, Save Our Horses obtained copies of the computer databases maintained by the Secretary of the Commonwealth, listing the names and addresses of every voter whose certified and allowed signature his office had counted in support of Petition A and in support of Petition E. Save Our Horses established a website linked to the two databases so that voters wishing to determine which list or lists their names were on could do so by entering their name and city or town.

18. Attached hereto as Exhibit H is a true and correct copy of a printout of the series of screens that are seen by a voter visiting the Save Our Horses Search Site. This example shows the results of entering the name and town of Plaintiff Celine Sullivan.

19. On January 21, 2002, Boston ABC affiliate WHDH-TV Channel 7 News ran a story titled "Real

Deal: Ballot Question Petitions." A true and correct copy of the transcript of that story is attached hereto as Exhibit I.

20. After the Channel 7 News story aired, more than 100 people contacted Save Our Horses through the website, many of whom confirmed that they had intended to sign only Petition A but were not listed as signers of Petition A, and that they had not intended to sign Petition E but were listed as signers of Petition E. Attached hereto as Exhibit J is a true and correct copy of a printout of one such response.

21. In addition to the website, Save Our Horses sent a mailing to approximately half of the voters who might have been victims of "bait and switch" involving the two petitions. By comparing the official database of Petition A signers and the official database of Petition E signers, Save Our Horses identified approximately 56,000 voters who were listed as signers of Petition E but not of Petition A.

22. On February 21, 2002, Save Our Horses sent an initial mailing of a single-page information request form to 6,000 out of the 56,000, or approximately 11 percent of the total. A true and correct copy of the information request form is attached hereto as Exhibit K. 6,000 was the most Save Our Horses had money to pay for.

23. As additional funds became available, Save Our Horses sent a second mailing to a separate group of 2,438 people on March 15, 2002. A third mailing of 19,613 was sent on Friday, March 23, 2002.

24. As of the date of this affidavit, Save Our Horses has received written responses from over 1,000 voters residing in all parts of Massachusetts, stating that they had intended to sign only Petition A

but were not listed as signers of Petition A, and that they had not intended to sign Petition E but were listed as signers of Petition E. These responses are entirely voluntary and required each voter to take the time to fill in his or her name and address and mail in the form. True and correct copies of a representative sampling of four of these responses are attached hereto as Exhibit I.

25. As of the date of this affidavit, Save Our Horses continues to receive in the mail completed forms from voters in response to the mailings.

26. Attached hereto as Exhibit M is a true and correct copy of a Save Our Horses color leaflet. At the top of the leaflet is a stylized graphic of a horse in the red, white and blue stars and stripes of the American flag. Below the graphic is information about the issue of slaughter of horses for human consumption, and an appeal for support of Brown Beauty's Bill (Petition A). In late 2001, I personally observed signature gatherers hired by the Ballot Access Company collecting Massachusetts voter signatures on clipboards which had a copy of this leaflet as the top sheet of paper.

Signed under the pains and penalties of perjury this 10th day of April, 2002

/s/ Susan Wagner
Susan Wagner

Sworn to before me on April 10th, 2002.

/s/ [Illegible]
Notary Public
My Commission Expires: 2/25/06

APPENDIX H

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
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[Logo]

TOM REILLY
Attorney General

(617) 727-2200
www.ago.state.ma.us

NEWS RELEASE

FOR IMMEDIATE RELEASE
NOVEMBER 16, 2001

CONTACT: BETH STONE
(617) 727.2543

ATTORNEY GENERAL CAUTIONS VOTERS: BE CAREFUL IN SIGNING BALLOT QUESTION PETITIONS

BOSTON—The Attorney General's Office has received several complaints about deceptive practices by some people gathering signatures on certain initiative petitions. Voters said they have been asked to sign a petition for a law to ban the slaughter of horses for human consumption, but when they indicated they want to sign that petition, they said they were given another, different petition to sign—one that proposes a constitutional amendment stating that only the union of one man and one woman shall be recognized as a marriage in Massachusetts.

After receiving those complaints this week, the Attorney General's Office did some spot checks which revealed that some voters may have signed a petition they did not support. Based on these complaints, the Attorney General advises the following:

–Carefully read and of paper being asked to sign. Make sure that you first read the summary of the proposal that is printed at the top of, or on the other side of, the paper you are signing. People gathering signatures may have deceptively placed a stack of petitions on a clipboard so that the petition on lop, which is shown to voters to read, deals with one issue (such as the slaughter of horses), but the petitions underneath, which are given to voters to sign, may deal with a separate issue (such as marriage).

–Look for a large capital letter printed in the lower–right corner on both the front and back sides that identifies the ballot questions. The horse-slaughter petition is marked "A"; the marrige petition is marked "E." information about the letters used to identify other petitions is available from the Secretary of State's Elections Division at 1-800-462-VOTE

–If you believe you may have been deceived into signing a petition and want to ensure that your name is not certified as a legitimate signer of the petition, immediately contact your local registrars of voters in writing. State that you want to ensure you are not counted as a signer of a particular petition, and identify that petition by its subject and, if possible by the letter printed in the lower-right corner. State that, if your signature appears on that petition, you warn your signature withdrawn and not certified. Be sure to state your name, address and telephone number and be sure to sign the letter in the same manner as you would have signed your signature on a petition. Deliver the letter to your local registrars of voters' office as soon as possible. This will maximize the chance that, if your signature is on a petition you did not wish to sign, your signature will not be counted.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

Civil Action No. 02-1318 A

NEIL P. ARKUSS, CHRISTINE BOGOIAN, MARIE COE, ANITA CONSTANTINE-GAY, BETHANY HUGHES, RICHARD LEEMAN, CELINE SULLIVAN,
Plaintiffs

v.

WILLIAM FRANCIS GALVIN,
Secretary of the Commonwealth,
Defendant

AFFIDAVIT OF MICHELLE K. TASSINARI

I, Michelle Tassinari, do hereby depose and state as follows:

1. I am the Legal Counsel in the Elections Division for the Secretary of the Commonwealth (the "Secretary"). I have held this position since March 2000. Prior to that, I was Assistant Legal Counsel in the Elections Division since January 1998.

2. Through my work at the Secretary's office, I have become very familiar with the initiative petition process in Massachusetts, including the procedures by which (1) petitions and signatures are reviewed and certified by local registrars, (2) information is inputted into the Commonwealth's Central Voter Registry, and (3) petitions and signatures are reviewed and approved by the Secretary.

3. When petitions in support of a particular initiative measure are submitted to the registrars of

the various cities and towns in the Commonwealth, the registrars are charged with the task of reviewing all of the signatures and "certifying" those that they can reasonably identify to be that of a registered voter in the city or town.

4. The registrars are instructed to, but may not always, enter all certified signatures on the petitions into the Commonwealth's Central Registry of Voters (CVR). The CVR is a statewide computer system connecting each city and town in the Commonwealth, the Registry of Motor Vehicles, and the office of the Secretary of the Commonwealth. The CVR contains a state-wide list of all registered voters in the Commonwealth, as well as records relating to which voters signed which nomination papers and petitions.

5. After they review and certify signatures on petitions supporting a particular measure, the registrars return the petitions to the proponents of the measure or other persons authorized to receive certified petitions. When receiving initiative petitions, the Elections Division reviews each signature sheet for extraneous marks.[1] Additionally, the Elections Division sorts initiative petitions into counties to comply with the "county distribution rule."[2] Only those petitions that are ultimately submitted to the Secretary, and those certified signatures that are ultimately approved by the Secretary, become the official petition/signatures in support of a particular

---

[1] This review is conducted in accordance with the mandates set forth in G. L. c. 53, § 22A, as outlined in *Walsh v. Secretary of the Commonwealth*, 430 Mass. 103 (1999) and *Hurst v. State Ballot Law Commission*, 427 Mass. 825 (1998).

[2] Pursuant to Amend. Art. 48 of the Massachusetts Constitution, no more than one-quarter of the certified signatures may come from any one county.

measure. The number of certified signatures per sheet is already written on the back of each sheet by the local registrars. The Secretary does not make a review of individual signatures.

6. In the fall of 2001, proponents for a law entitled "Brown Beauty's Bill, A Ballot Initiative to Ban the Slaughter of Massachusetts Horses for Human Consumption" (the "Horse Petition") submitted petition sheets containing signatures to the local registrars. Thereafter, by December 5, 2001, the proponents of the Horse Petition submitted petitions bearing 54,818 signatures to the Secretary. *See* Pls. Exhibit 1(D).

6. With respect to the Horse Petition, the number and identity of signatures that were turned into the Secretary differs from the number and identity of signatures that were inputted by the local registrars into the CVR. As discussed in the following paragraphs, this is true for at least two reasons.

7. First, it is almost certainly the case that some individuals signed the Horse Petition, but their signatures were not "certified" by the local registrars and, as such, their names do not appear on the CVR as signing the Horse Petition. Pursuant to the Code of Massachusetts Regulations (950 C.M.R. 55.00) governing the certification of signatures by local registrars, the registrars cannot certify signatures for various reasons, including because the signature is illegible, it was placed on a petition for the wrong city or town, the address is incorrect, or it was received too late.

8. Second, certain signatures on the Horse Petition were "certified" by the local registrars and turned into the Secretary but were not, in fact, inputted into the CVR. This is evident from a comparison of (1) the number of Horse Petition signatures for each county

that were turned into the Secretary with (2) the number of Horse Petition signatures for each county that were inputted into the CVR. Such a comparison, which was prepared by myself, is attached hereto as Exhibit A. Exhibit A shows that, in five counties (Essex, Hampden, Norfolk, Plymouth, and Suffolk), the number of certified signatures that were turned into the Secretary exceeds the number of certified signatures as reflected in the CVR. As a result of this discrepancy (as well as other factors), the only way to ultimately determine whether an individual truly did not sign the Horse Petition is to review the actual petitions that were submitted to the Secretary.

9. It is my understanding, based on conversations that I have had with counsel for the plaintiffs and with Susan Wagner, the chairperson of Save Our Horses, that the "official database" that Susan Wagner refers to in paragraph 21 of her affidavit (and from which Save Our Horses obtained voter information for their mailing) is the Commonwealth's Central Voter Registry. *See* Pls. Ex. 1, ¶ 21.

10. I am not aware of any instances in which the State Ballot Law Commission has found "good cause" to waive the requirement in 950 C.M.R. 59.03(20A) that the Commission will not admit into evidence voter affidavits to resolve the question of what a voter did or did not intend to sign.

Signed under the pains and penalties of perjury this 17th day of April, 2002.

/s/ Michelle K. Tassinari
Michelle K. Tassinari

APPENDIX J

[MGLPC LOGO]
Massachusetts Gay & Lesbian Political Caucus
P.O. Box 246
State House
Boston, MA 02133
(617) 262-1565

March 6, 2002

The Honorable Paul J. Donato
House of Representatives
State House, Room 443
Boston, MA 02133

Dear Representative Donato:

As you know, signatures on an anti-gay initiative petition were acquired all around Massachusetts, in large part through fraudulent means. The deception included a loosely organized bait and switch scheme involving a second petition to ban horse slaughter. Voters who intended to sign one petition were instead slipped the papers for the anti-gay one. Signatures were copied. People were told lies.

In the coming months, we hope for the opportunity to have a dialogue with you about the substance of the ballot question. We look forward to that. In the meantime, we believe we already share some important common ground with you: an interest in fairness and integrity.

Attached you'll find a "Constituent Alert" that we hope you will send (either as an email or a letter) to some of the people you represent. You need not agree with us on the issue – or even have a firm position yet – in order to help protect three things we all hold dear that are under direct attack:

1. Trust in our democratic institutions and processes.

Whatever you may think of the initiative petition process, it's clear that it was abused here. The anti-gay group paid dearly for signatures, escalating the bounty to $1.50 per signature. The signature-gathering firm they hired had a well-documented pattern of corruption and forgery elsewhere, particularly in its home state of Arizona. Employees have been imprisoned. Here in Massachusetts, cases of fraudulently obtained signatures continue to be discovered and documented, and the scandal has been exposed in the press.

2. The autonomy of your constituents, their "ownership" of their names.

The company gathering signatures on the anti-gay petition stole signatures in many ways, from illegal acts that rise to the level of election fraud...to unethical behavior that outrages voters just the same. At www.massequality.org, voters can learn about the different scams used in this case, and search for their names instantly on the public record of the anti-gay petition. People have a right to know if their names were stolen. In our experience, their position on the actual ballot question makes them no more or less forgiving of this outrage.

3. Basic human rights of families in your districts.

At home, in your districts, you have supporters whose families and friends are at risk of being placed outside the law, permanently, by Constitutional fiat. The anti-gay group behind this extreme ballot initiative has publicly called for a "culture war." They are seeking to take away the right of a minority group to

engage their government in any dialogue about essential progress and protections for their families. This measure will mandate a "No" to any request a gay person makes to his or her government on behalf of his or her family. Its power will trump all legislators, all voters, all courts and all acts of governmental entities past, present and future.

About the "Constituent Alert" we hope you will send

As you know, you'll be voting on this anti-gay initiative (H4840) this year in a Constitutional Convention. We look forward to speaking with you in advance of that. In the meantime, we hope you'll consider helping with this important task – in service to the people and ideals you represent.

The attached sample message explains the extraordinary case of this anti-gay signature collecting process, and directs your constituents to **www.massequality.org**. There, they can check the public record in seconds to see if they were among the victims of fraud or forgery. We can't imagine the people you represent would not be grateful to you for this information. No one should have this happen to their good names, regardless of the issue.

We hope you'll agree that it's important to spread the word, educate your constituents about the website, and enable victims to come forward. No bad thing can come from bringing fresh air into what was a polluted process.

On November 17, 2001, just after Attorney General Reilly issued an advisory to voters about this signature collecting scam, the anti-gay advocates responded this way in a press release: "We have made it clear that we will not accept petitions gathered

under false circumstances." It is now clear that they did accept those petitions, every last one – and then submitted them to the Secretary of State. While it's plainly impossible to find all the victims of fraud and forgery, it's important to try.

The attached "Constituent Alert" email is only a sample, provided for your convenience. We realize you may wish to change it or personalize it as you see fit, and that a letter may be your preferred vehicle. If you have not yet visited **www.massequality.org** yourself, we urge you to do so.

History records what we do at moments such as these.

The anti-gay activists are seeking to nullify the right of gay and lesbian citizens to engage in civil rights discussions, on behalf of their families, with any governmental entity in Massachusetts. No American should be silenced in this way.

That said, we do know that people of goodwill disagree on all issues, including this one. We welcome legitimate debate with anyone who opposes or misunderstands us – in this case, those who assert that the state is somehow served well by protecting some families and destabilizing others. Our outrage at being part of this ugly debate is exacerbated by the illegitimate means used to force it upon us. We are grateful for any help you might offer.

Sincerely,

Gary Daffin and Arline Isaacson
Co-Chairs

enclosure: sample Constituent Alert

Dear Constituent:

Could your name have been used without your knowledge on an anti-gay initiative petition? According to reports around Massachusetts, the answer is "yes."

On November 17, 2001, the Massachusetts Attorney General issued a voter warning about illegal and unethical signature gathering tactics in this case. In the last month, the scandal has been exposed by the Boston Globe, Boston Herald, Metro-West Daily News, Springfield Union-News, Hampshire Daily Gazette, Berkshire Eagle, and WHDH-TV "7 News" investigative reporter Hank Phillippi Ryan.

Despite this attention, the news hasn't reached the vast majority of voters. This is why I'm writing to you today. You can find out instantly if you were a victim of fraud or forgery. Just visit **www.massequality.org** to search for your name before you log off – or, call 617-859-0325.

The website and easy search system were built by a coalition of human rights organizations and local leaders in gay and lesbian civil rights that oppose this initiative. Certainly there will be debate about this initiative but regardless of how any of us feel about it, there is no debate about this: your good name and your signature belong to you. No one has the right to co-opt your name and use it without your permission to advance their cause.

I encourage you to check **www.massequality.org** (or call 617-859-0325), first and foremost to see if you, your friends or your family were victims of this fraud.

Thank you.

APPENDIX K

SENATE . . . . . No. 2335

The Commonwealth of Massachusetts

MAJORITY REPORT
on the
INITIATIVE PETITION
of
BRYAN G. RUDNICK
for an
INITIATIVE AMENDMENT
TO THE CONSTITUTION
RELATIVE TO THE
PROTECTION OF MARRIAGE
(see House, No. 4840)

April 24, 2002.

MAJORITY REPORT

It is the majority opinion of the Legislature's Joint Committee on Public Service to oppose this initiative petition.

The supporters of House 4840 claim that they intend to harm no one, only to protect marriage. In reality, this measure will make it illegal—in fact, unconstitutional—for thousands of Massachusetts citizens to receive health insurance, bereavement leave, medical leave, hospital visitation, survivor benefits, and other basic legal protections that families and children need. Because this amendment is inconsistent with the principles on which our Constitution is based, a majority of the members of the Joint Committee on Public Service agree that this initiative should riot pass and we urge you to vote no.

This amendment includes language that would deny present and potential benefits and protections to thousands of citizens. The prohibition would apply under any circumstances, no matter how compelling the needs for those protections, or how detrimental the consequences to the families and children who lack them. The amendment would make it unconstitutional for some of our citizens to leave work to care for a sick child or to have the right to visit that sick child or a loved one in the hospital, to make medical decisions for them if they are incapacitated, or to include them in their health insurance.

The amendment would make it illegal for some police officers or rescue workers killed in the line of duty to leave survivor benefits to a longtime partner—or even for the survivor to have the unquestioned right to make funeral arrangements. These problems would be as insurmountable for senior

citizens as for younger people. This would be constitutionally required and permanent.

A constitutional amendment that bars a segment of society from enjoying the rights and privileges afforded to others is discrimination. Discrimination sanctioned under law is wrong and unacceptable. In addition, it raises issues under the United State Constitution.

The effects of this amendment would be far reaching. It would be bad for business and bad for labor. Massachusetts would not only allow discrimination, but require it, forbidding employers from granting key benefits to their employees, hampering employers' efforts to recruit and retain workers by offering fair, competitive benefits, and making it unconstitutional to bargain collectively for important employee rights and benefits. Furthermore, concerns about the manner in which signatures were gathered for this ballot initiative call into question the fairness and legitimacy of the process itself.

Ours is a distinguished history and we believe that the Constitution of the Commonwealth of Massachusetts should be a document of which all of our citizens can be proud. We urge you to vote no on House 4840.

The following members of the committee signed the report:

Harriette L. Chandler
Brian S. Dempsey
Brian A. Joyce
Anne M. Gobi
Susan C. Fargo
David M. Torrisi
Jo Ann Sprague
Paul C. Demakis
Barry R. Finegold
Rachel Kaprielian
Karen Spilka
Robert A. Havern
Walter E Timilty
Steven C. Panagiotakos
David M. Naugle

AMICUS CURIAE BRIEF

No. 09-559

IN THE
Supreme Court of the United States

JOHN DOE #1, *et al.*,
Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL AND WASHINGTON STATE NEWS PUBLISHERS, NEWS BROADCASTERS AND NEWS MEDIA PROFESSIONAL ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici, identified and described in Appendix A, are leading print and online news publishers, news broadcasters, and news media professional associations, both nationally and in the State of Washington. They share an interest in assuring the vitality of freedom of information laws such as Washington's Public Records Act. News media depend on such records laws to fulfill their constitutionally essential watchdog role.

SUMMARY OF ARGUMENT

The Petitioners' disregard for – indeed, disparagement of – the value of public records statutes would, if accepted by this Court, threaten the ability of the press to provide accurate and timely news coverage about government actions and matters of public importance. *Amici* particularly urge this Court to reject Petitioners' unprecedented proposal to "apply[] strict scrutiny to each application of a disclosure statute." Such a far-reaching rule is unnecessary to decide this case, and adopting it would turn routine records requests into constitutional disputes any time a public record happens to name an individual. This Court instead should recognize, as it has in the past, the critical role that public records laws play in assuring an

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief

informed electorate and a functioning democracy. The decision below accordingly should be affirmed.

I. Like the federal Freedom of Information Act and similar records laws in all 50 states, Washington's Public Records Act ("PRA") mandates broad disclosure of records used by public agencies in conducting government business. Such statutes assure that citizens have a means of keeping tabs on those who govern them, which is "vital to the functioning of a democratic society," *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and of "critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

Petitioners ask this Court to do what no court, at any level, has ever done: declare that a public records statute violates the *First Amendment* "right to privacy" of an individual who is named in a disclosable public record. Their position fundamentally misapprehends the PRA. The statute compels no speech, nor does it burden the speech or improperly impair the privacy of private individuals. It simply requires, in a non-discriminatory fashion, that Washington agencies provide access to all public records unless a specific exemption applies.

II. Petitioners also misapprehend Washington's referendum process and First Amendment precedent. The referendum process is in no sense private. Rather, individuals who add their signatures to these public records do so freely. And they do so with the constructive, if not actual, knowledge that the PRA requires Washington

agencies to provide access to public records unless a specific exemption applies. Unlike individuals disseminating anonymous leaflets, as in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), people who sign public petitions knowingly expose their identities to full public view, including to petition organizers, public officials and innumerable other strangers. They have no reasonable expectation of privacy.

Indeed, the nature of Washington's referendum process makes Petitioners' privacy claim particularly unmeritorious. Under Washington law, referendum signers act as participants in a fourth branch of government, exercising power reserved in the State Constitution to legislate. Such legislative activity is historically public. So is the very act of petitioning itself. The right of petition was understood, at and before the Nation's founding, to be a means of *publicly* seeking redress from the government. The Petitioners' attempt to distinguish between "public disclosure" and "private disclosure to the government only" is contrary to this tradition of public petitioning; to the entirely public nature of Washington's referendum process; and to the PRA itself, which only applies to records used by public agencies to do the public's business.

III. Petitioners' proposal to apply strict scrutiny "to each application of a disclosure statute," if accepted, would dramatically change the public records landscape across the country, and not just with respect to election records. It would place barriers to the public's right to know and its ability to hold government accountable. Petitioners'

argument that strict scrutiny is required because of the allegedly high cost of all public records disclosure rests on questionable evidence that has never been subject to cross-examination, and on unsubstantiated fears about technology. On the latter point, as this Court recognized earlier this Term, the advent of the Internet makes public disclosure more, not less, important. The experience of *Amici*, who rely regularly on records statutes, confirms that strong public records laws remain essential to assuring an informed electorate and robust public debate. Without ready access to public records, countless important stories – including stories about election fraud and malfeasance by officials, partisans, and individual voters – would go unreported.

Disclosure under the PRA implicates no cognizable First Amendment right, and there is no authority holding that disclosure under such a records statute is any burden on speech. But even if strict scrutiny applied, the PRA in general, and the disclosure at issue in this case, are narrowly tailored to serve compelling interests in assuring an informed electorate, the integrity of elections, and the sovereignty of citizens over their public agencies.

ARGUMENT

I. Washington's Public Records Act, Like Other State and Federal Records Laws, Neither Limits Nor Compels Speech, but Simply Provides for Public Access to Government Records

Petitioners' brief scarcely addresses the statute that they portray as an unconstitutional

infringement on free speech. Washington's Public Records Act does not compel anyone to speak, nor limit anyone's right or ability to speak. Contrary to the premise of all of Petitioners' arguments, the PRA does not regulate speech at all. It simply mandates that public records held by state government are generally available for public inspection.

In 1972, Washington voters – using the same petition process relied on 37 years later by the sponsors of Referendum 71 – placed on the statewide ballot a public disclosure measure known as Initiative 276. The initiative was approved by over 72 percent of voters. Washington State Bar Ass'n, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meeting Laws* 2-2 (2006) ("PRA Deskbook"). The preamble to the measure, codified in the PRA itself, states that the law's purpose is to promote transparency and government accountability:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

Wash. Rev. Code § 42.56.030 (2009). "The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty

of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994).

Petitioners contend that the PRA is impermissibly content-based because it "places heavier burdens on those *opposing* government action than those supporting it." Petrs.' Br. 41-42. But the PRA makes no distinction based on content. Rather, it applies to *all* records retained or used by state and local government agencies. Wash. Rev. Code § 42.17.020(2), (42) (definitions of "agency" and "public record"); Wash. Rev. Code § 42.56.070(1). Nor does the PRA impose burdens, of disclosure or otherwise, on any individual or private entity. It compels no person to speak.[2] The statute applies only to government agencies. *Id.* An agency's obligation is to make its records available for

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[2] The "three levels of compelled speech" alleged by Petitioners (Petrs.' Br. 35-38) are a fanciful construct with no basis in reality. The State does not compel referendum supporters to say anything or to associate with anyone. However one characterizes disclosure of the referendum petitions, it is not "compelled speech" as this Court has ever used that term. All of this Court's compelled speech cases involve an element of state coercion, wholly absent in this case, in which the government forced individuals to make statements they would not otherwise have made, or to associate with speech with which they disagree. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (state could not force residents to display message on license plate offensive to their religion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking statute requiring newspapers to publish candidate statements), *W. Va. State Bd. of Educ. v. Barnette*, 319 U S. 624 (1943) (students could not be forced to recite Pledge of Allegiance).

inspection or copying upon request, unless a specific statutory exemption to disclosure applies. The PRA applies to the referendum petitions at issue here because they are records "relating to the conduct of government or the performance of any governmental ... function" that are "owned, used, or retained" by the Secretary of State, a state agency. Wash. Rev. Code § 42.17.020(42).[3]

The PRA is not unique. Similar public records statutes exist in all 50 states.[4] The PRA was

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[3] Petitioners do not contend that the referendum petitions fall outside the PRA's definition of "public records," or that any statutory exemption applies. They contend that the petitions are not public records under State "precedent" (Petrs.' Br. 9 n.18), but they cite no binding authority, and most of the extra-judicial statements Petitioners rely on for this point pre-date the PRA – which, as noted above, mandates disclosure of *all* public records unless a specific exemption applies. Wash. Rev. Code § 42.56.070(1).

[4] *See* Ala. Code 36-12-40 *et seq.*; Alaska Stat. 40.25 110 to 125; Ariz. Rev. Stat. Ann. 39-121 to -128; Ark. Code Ann. § 25-19-101 *et seq* ; Cal. Gov't Code §§ 6250 to 6270; Colo Rev. Stat. 24-72-201 *et seq.*; Conn. Gen. Stat. § 1-200 *et seq* ; 29 Del C. § 10001 *et seq.*; D.C. Code Ann. § 2-531 *et seq.*; Fla. Stat. Ann. 119.01 to 119.15; Ga. Code Ann. 50-18-70 to -77; Haw Rev. Stat. § 92F-1 *et seq* ; Idaho Code 9-338 to -347; 5 ILCS 140/1 – 140/11.5; Ind. Code Ann. 5-14-3-1 to -10. Iowa Code Ann. 22 1 to .14; Kan. Stat. Ann. 45-215 to -250; Ky. Rev Stat Ann. 61.870 to .884, La. Rev Stat Ann 44:31-41; Me Rev. Stat. Ann. 1-13 § 401-412; Md. Code Ann. State & Govt. 10-611 to -630; Mass Gen. Laws Ann. Ch. 4, § 7, Ch. 66, § 10; Mich. Comm. Laws 15 231 *et seq.*; Minn. Stat. Ann. 13.03, Miss. Code Ann. 25-61-1 *et seq.*; Mo. Ann. Stat. 109.180 to .190; Mont. Code Ann. 2-6-101 to -111; Neb. Rev. Stat. § 84-712, § 84-1201-1227; Nev Rev Stat. Ann. 239.001 to .330, N.H. Rev Stat. 91-A:1-9; N.J.S.A. 47:1A-1 *et seq.*; 14-2-1 NMSA 1978 *et seq* ; NY Pub Off Law Sec. 84-90; N.C. Gen. Stat. 132-1 to -10; N.D. Cent. Code 44-04-

modeled, in large measure, on the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, which was enacted just six years earlier.[5] Yet Petitioners are unable to identify *any* authority supporting their contention that disclosing a public record – under any state or federal records statute – burdens the speech of a subject of that record. Indeed, *Amici* are aware of no decision, other than the district court opinion in this case, upholding a First Amendment challenge to a public records law. Certainly nothing in this Court's FOIA jurisprudence supports Petitioners' novel argument that public records statutes threaten citizens' speech. On the contrary, the Court has recognized that such laws are essential to informed public dialogue. Like the PRA and similar laws in other states, FOIA's purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire*, 437 U.S. at 242. Public records laws such as FOIA are "a

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18 to -32; Ohio Rev. Code Ann. 149.43; Okla. Stat. Ann. Tit. 51.24A 1 to .29; Or Rev. Stat. 192.410 to .505; Pa. Cons. Stat. Ann. Tit. 65 P.S. § 67.101 *et seq.*; R.I. Gen. Laws 38-2-1 to -15; S.C. Code Ann. § 30-4-10 *et seq.*; S.D. Codified Laws Ann 1-27-1 to -45; Tenn. Code Ann. 10-7-503 *et seq.*; Tex. Code § 552.001 *et seq.*; Utah Code Ann. 63-2-201 to-207; Vt. St. Ann. 1, § 315-320; Va. Code § 2.2-3704; W. Va. Code S 29B-1-1 *et seq.*; Wis. Stat. Ann. 19.31 to .39; Wyo. Stat. Ann. 16-4-201 *et seq.*

[5] Though similar in their purpose, basic operation, and presumption of access, the PRA and FOIA are not identical. There are differences in procedures, remedies, and the scope of certain exemptions, among other things. *See PRA Deskbook*, at 19-4 to 19-6.

means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (citation omitted).

Petitioners seek to turn this "structural necessity" on its head. They invite the Court to recast public records statutes not as a mechanism for securing informed public participation in the democratic process, but as a threat to it. The Court should reject this view, and instead should confirm its commitment to statutory schemes that presume broad access to public records. This presumption of access is critical to the functioning of public records laws like the PRA and FOIA, under which disclosure is the rule and exemptions are narrowly circumscribed by statute. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975) (disclosure of records is required under FOIA unless a specific exemption applies); 5 U.S.C. § 552(b); Wash. Rev. Code § 42.56.030; *cf. EPA v. Mink*, 410 U.S. 73, 79 (1973) (federal records act prior to enactment of FOIA "came to be looked upon more as a withholding statute than a disclosure statute" because exemptions were vague and broadly worded). Petitioners' view threatens the ability of *Amici* and others to use public records laws to "know what their Government is up to."

II. The First Amendment Does Not Guarantee a Right of Anonymity To Those Who Sign State Referendum Petitions

A. No "Right to Privacy" Applies To Signing a Referendum Petition, Which Is Not Private Speech But Rather an Act of Lawmaking Conducted in Full Public View

The crux of Petitioners' argument is that disclosure of public records identifying individuals who sign a ballot measure petition violates those individuals' "First Amendment right to privacy." This argument fails because the referendum process is in no way private; rather, it is legislative activity, historically open to public scrutiny.

Participation in Washington's referendum process is not "private" speech. First, Washington citizens who sign a referendum petition are not expressing a private opinion or privately urging officials to take action. Rather, they are engaged in legally operative conduct that is, by definition, an act of lawmaking. Under the Washington Constitution, although legislative authority is vested in the state legislature, the people expressly reserve to themselves the power both to enact (by initiative) and revoke (by referendum measure) state statutes. Wash. Const. art. II, § 1; Wash. Rev. Code § 29A.72.010. This constitutional power "provides a 'fourth element [to the three branches of government:] the people, reserving the right to assert its will over the legislative department of the government.'" *Wash. State Farm Bureau Fed'n v. Reed*, 115 P.3d 301, 305 (Wash. 2005) (quoting *State*

ex rel. Brislawn v. Meath, 147 P. 11, 16 (Wash. 1915)); *Belas v. Kiga*, 959 P.2d 1037, 1040-41 (Wash. 1998) ("A referendum ... is an exercise of the reserved power of the people to legislate ...."). This Court has recognized that initiatives and referenda enacted under Washington law are "plainly 'legislation'" and have "the effect and status of ordinary laws in every respect." *Cammarano v. United States*, 358 U.S. 498, 505-06 (1959).

Because signing a referendum petition is an exercise of legislative power, it is an inherently public process. There is no constitutional right to legislate secretly. To the contrary, treating such lawmaking as "private speech" would be antithetical to a free and open democracy. *See* R.B. Bernstein, *The Founding Fathers Reconsidered* 75 (2009) (noting that state ratifying conventions of the federal Constitution were open to the public, which "set a precedent for later legislative bodies to stop meeting behind closed doors and to open the galleries for ordinary citizens and for journalists to attend the sessions of legislatures – the first stirrings of the public's right to know.") Madison, for example, recognized the importance of assuring that lawmakers were exposed to both public sentiment and public scrutiny:

> Whatever facilitates a general intercourse of sentiments, as good roads, domestic commerce, a free press, and particularly a circulation of newspapers through the entire body of the people, *and Representatives going from, and returning among every part of*

> *them*, is equivalent to a contraction of territorial limits, and is favorable to liberty, where these may be too extensive.

Public Opinion, Nat'l Gazette, Dec. 19, 1791 (emphasis added). Assuring that lawmaking is done in the light of day cannot be unconstitutional. Rather, it furthers the public interest in holding its lawmakers accountable, which is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broad.*, 420 U.S. at 495.

The second reason why referendum petitions are not private speech is that those signing them have no reasonable expectation of privacy. As detailed in Respondents' briefing and the decision below, the referendum process is public from beginning to end. Signatures are gathered in public, and signers can be identified by anyone in the vicinity, by signature gatherers, and by others who are asked to sign the same petition form. Referendum organizers have no obligation to keep the identity of signers a secret. Indeed, organizers themselves can post the names of petition signers online, use the names for political, marketing or other purposes, and even sell the list of signers to commercial or other concerns with no connection to the referendum campaign. Moreover, Washington law *requires* the sponsors to submit the petitions to the Secretary of State for verification and canvassing, in a process that can be publicly observed and challenged in court. Wash. Rev. Code § 29A.72.230, .240.

The entire process, in sum, is neither private nor anonymous. Petitioners attempt to obscure this fact by positing a distinction between "public disclosure" and "private disclosure to the government only." Petrs.' Br. 38. But there is no authority suggesting that any such constitutional distinction exists.[6] Moreover, the factual record and statutory requirements noted above make clear that referendum petition signers are not making a "private disclosure." Petitioners assert that distribution of the petitions sometimes may occur without disclosure to other signers, and that those who sign the petitions might not mind if their identities are revealed to "like-minded" individuals

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[6] Petitioners rely on *Campaign for Family Farms v. Glickman*, 200 F 3d 1180 (8th Cir 2000), but that case rested on FOIA's statutory privacy exemption, not the First Amendment. *Glickman* concerned a petition by pork producers to the Department of Agriculture, seeking a referendum vote to terminate a federally imposed marketing assessment. In holding that the identity of the petitioners was exempt from disclosure under FOIA, the Eighth Circuit rested on the fact that the petition did not merely call for a referendum, but specifically disclosed the petitioner's position on the ultimate issue. *Id.* at 1188. The R-71 petitions contain no such disclosure. Petitioners also rely on *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), but that case is not remotely comparable to this one. It concerned the FEC's proposed release of a union and a political party's confidential internal documents revealing strategy, mobilization efforts, polling data and the like. The court had little difficulty in concluding that disclosure of such information – obtained by the FEC in response to subpoenas and agency investigative demands – burdened political speech and the organizations' future political efforts. *Id.* at 176-78. Neither *Glickman* nor *AFL-CIO* supports the contention that signing a petition that actually sponsors legislation in an exercise of state legislative power is a "private disclosure."

such as the organizers or other petition signers, or to government officials for verification purposes. Petrs.' Br. 36-38. No record support is offered for any of these contentions, but even if they are true, they do not support a finding that the petition signers are entitled to any expectation of privacy. Signatures are widely circulated and publicly available long before the PRA enters the picture.

In addition, Petitioner's ill-defined category of "private disclosures to the government" is, at best, superfluous in the context of the PRA. The distinction between "public disclosure" and "private disclosure to the government" is accounted for in the statute itself: the PRA applies only to agency records that contain "information relating to the conduct of government or the performance of any governmental or proprietary function." Wash. Rev. Code § 42.17.020(42).[7] Moreover, privacy concerns are fully accounted for in the statute's numerous exemptions to disclosure. *See, e.g.*, Wash. Rev. Code § 42.56.230 (certain personal information exempt); .240 (investigative records exempt to extent needed to protect personal privacy); Wash. Rev. Code § 42.56.270 (trade secrets and certain private financial information exempt).

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[7] Petitioners assert that disclosure of referendum signatures "is 'public' only in the sense that it is revealed to a public official[.]" Petrs ' Br. 37. Petitioners miss the critical point – which is that once the records are submitted to a public agency for a government-related purpose, they are "public records" subject to the public's right to be "informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030.

Finally, although the State-created right of direct legislation is not an exercise of the right to "petition" as that term is used in the First Amendment,[8] it bears mention that petitioning has been understood historically as an inherently public act. Petitioners claim that they have a constitutional right not to be identified with "their belief that a measure should be placed on the ballot." Petrs.' Br. 15. Setting aside the point that the referendum petitions contain no significant expression (but are instead legally operative legislative *conduct*), where is the constitutional harm from disclosure? Petitioners answer this question primarily by likening the petition process to balloting, which, since the adoption of the Australian Ballot, generally has been treated by States as entitled to confidentiality. Petrs.' Br. 18-22.

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[8] Those exercising the referendum process are not merely urging officials to provide redress or to act on their behalf. They are instructing the Secretary of State to place a legislative measure on the ballot – an instruction the State has no discretion to ignore if the petitions meet the statutory criteria.

But petitions are not ballots.[9] Historically, petitions have been used to make a *public* plea to the government. The first colony to recognize the right to petition (Massachusetts, in 1641) expressly understood it as such, recognizing it as a right to appear at official proceedings to seek public redress: "Every man ... shall have libertie to come to any publique Court, Council or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information whereof that meeting hath proper cognizance[.]" Colonial Laws of Massachusetts, p. 90 (1641). Petitions were understood by the Founders as a means by which the people "may communicate their will" to government officials. 1 Annals of Cong. 738 (James Madison, Aug. 15, 1789). At the time of the nation's founding, it was understood that the very point of petitions was to make them fully visible to the community at large:

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[9] The cases Petitioners rely on for the assertion that the two are equivalent involved petitions that did not merely seek a vote, but required the petition signers to declare how they would vote on the ultimate issue. *Id.* at 20-21 (citing *Anderson v Mills*, 664 F.2d 600 (6th Cir. 1981)) and *Glickman*, 200 F.3d 1180. The R-71 petitions contain no such declaration of intent with respect to the ultimate issue – a fact that several of Petitioners' supporting *amici* concede. *See, e.g.*, Br. of Amicus Common Sense for Oregon *et al.* at 11 (signatures on referendum petition are "clearly not statements of public support for the initiative.... One may not divine from a signature on a petition that the signer ultimately supports or opposes the measure; nothing in the language of the petition sheets supports such a claim").

> The petition is then handed from town to town, and from house to house; and, wherever it comes, the inhabitants flock together, that they may see that which must be sent to the king. Names are easily collected. One man signs, because he hates the papists; another, because he has vowed destruction to the turnpikes; one, because it will vex the parson; another, because he owes his landlord nothing; one, because he is rich; another, because he is poor; one, to show that he is not afraid; and another, to show that he can write.

Samuel Johnson, *The False Alarm* (1770). This Court likewise has recognized the public nature of petitions: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

The right Petitioners seek to vindicate here – a right to maintain secrecy as they sponsor laws in their capacity as citizen legislators – cannot be squared with the nation's tradition of public petitioning. Petitioners also ignore the public attributes, and the absence of privacy, that pervade Washington's referendum petition process. In no way can the act of signing the petitions at issue in this case be deemed "private."

B. There Is No Precedent For the Right of Anonymity Sought By Petitioners Here

No court has held that the Constitution mandates anonymity for individuals who sign referendum or initiative petitions. The circumstances in which this Court has recognized First Amendment protection for anonymity are readily distinguishable from the case at bar.

Petitioners rely heavily on *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (*Buckley II*), for the proposition that state regulation of the initiative process is subject to strict scrutiny because it burdens political speech. But both cases involve direct restrictions on those who were permitted to *gather* petition signatures; neither discussed the disclosure of public records identifying petition signers. In *Meyer*, the Court found that a statutory prohibition on paid signature gatherers imposed an unconstitutional burden on political speech. But the "burden" recognized by the Court was that the prohibition "limit[ed] the number of voices who will convey [petition sponsors'] message[.]" *Meyer*, 486 U.S. at 422. Subsequent public identification of those involved in the petition process imposes no such burden – a point made expressly in *Buckley II*. There, this Court struck certain portions of a Colorado statute directly restricting who could collect signatures, but affirmed the Tenth Circuit's holding that it was no burden on political speech to require signature gatherers to provide affidavits containing their name, address and signature. 525 U.S. at 198. This was so despite

the fact that the affidavit is *a public record* under Colorado law. *Id.* The Court further recognized that the affidavit requirement supported the state's interest in assuring the integrity of the ballot process. *Id.*[10]

Unlike *Meyer* and *Buckley II*, this case involves no regulation of signature gatherers; no limitation on the number of voices available to convey the organizers' message; and no limitation on any rights of association, as the petition signers are not part of any organized political group.[11] In fact, the PRA does not restrict petition signers' political speech in any way.

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[10] The Court distinguished the affidavit, which was available as a public record *after* the signatures were filed, from a requirement that signature gatherers wear identification badges containing their names. The badge requirement burdened political speech because it "forces circulators to reveal their identities at the same time they deliver their political message," whereas the affidavit "is separated from the moment the circulator speaks." 525 U.S. at 198-99. The disclosure at issue in this case is likewise separated in time from the petition signing. As noted above, the signatures are subject to disclosure under the PRA only after they are submitted to the Secretary of State.

[11] This fact also distinguishes *NAACP v. Alabama*, 357 U.S. 449 (1958). Petitioners rely on that case for the proposition that the First Amendment prevents compelled disclosure of one's association with a political organization. But that holding assumes some group exists. Here, those who sign the referendum petitions are not disclosing any association with a political group; they are simply voters taking action to qualify a ballot measure.

Petitioners also rely on *McIntyre v Ohio Elections Commission*, 514 U.S. 334 (1995). But this case does not resemble *McIntyre* at all. Mrs. McIntyre was not trying to enact legislation. She was an individual citizen expressing her personal opinion against a proposed tax levy in a leaflet. Noting the long tradition of anonymous literature and the many reasons why individual speakers may wish to remain anonymous, the Court held that the leaflet at issue was core political speech, and that an Ohio statute prohibiting the circulation of all anonymous campaign literature could not survive strict scrutiny. But the Court expressly disclaimed any broad reading of this holding, noting particularly that in the context of assuring fair elections, a state's enforcement interest could "justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here." *Id.* at 353.[12]

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[12] As Justice Ginsburg noted,

> In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.

Id. at 358 (Ginsburg, J., concurring) Gathering signatures statewide on a publicly circulated petition aimed at placing a referendum on a ballot is such a "larger circumstance." Petitioners call to mind Justice Scalia's caution that "[t]he

McIntyre does not apply here, first, because unlike Mrs. McIntyre's handbill, referendum petitions are – by definition – not anonymous. They are circulated among voters, who must identify themselves in order to effectuate the petition's purpose of placing a measure on the ballot. Second, the petitions are public, not private, documents, for the reasons set forth above. Third, the petitions are not an individual's expression of opinion, but rather are an act of lawmaking. Indeed, unlike Mrs. McIntyre, the petition signers here do not control the content of their supposed expression; they are signing on to legally operative language prescribed by the State. States are not constitutionally required to impose secrecy in such circumstances. Rather, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley II*, 525 U.S. at 191.

The First Amendment protects the right of Petitioners, and others, to engage individually in anonymous speech supporting or opposing Referendum 71. The First Amendment also limits the State's ability to regulate petition signature gatherers in a manner that restricts the organizers' ability to circulate their message. But no case, and no First Amendment principle, precludes the State from treating as a public record the publicly

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silliness that follows upon a generalized right to anonymous speech has no end," *id.* at 381 (Scalia, J. dissenting), when they propose treating a statewide referendum campaign as no different than a lone anonymous pamphleteer.

circulated, State-reviewed petition forms used to place legislation on the ballot. As set forth below, these are matters of public concern, and as such they should not be shrouded in secrecy and anonymity based on an amorphous and previously unrecognized First Amendment right.

III. Disclosure of Referendum Petitions Under the PRA Does Not Violate the First Amendment

Nothing in this Court's First Amendment decisions grants Petitioners any right to remain anonymous in the circumstances presented here. Nor do Petitioners cite any authority for their novel theory that public records laws burden speech. Accordingly, the PRA implicates no cognizable First Amendment right.

Nevertheless, the decision below assumed, without deciding, that signing a referendum petition contains some expressive conduct and that the PRA's access requirements have an incidental effect on speech. Based on those assumptions, it applied intermediate scrutiny. *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009) (citing, and applying, the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). *Amici* submit that if the record disclosure at issue in this case is subject to First Amendment scrutiny at all, this standard is sufficient, and was correctly applied below.

Petitioners urge this Court to go even further, arguing that the previously unknown right to anonymously legislate must be protected by strict scrutiny. Their three arguments for doing so (Petrs.'

Br. 40) all rest on fictions. First, they claim that the PRA burdens core political speech; but, as detailed in section I above, the PRA does not limit or compel any type of speech, political or otherwise. Second, they claim the PRA is content- or viewpoint-based; but, as also addressed above, it is neither. The PRA applies in non-discriminatory fashion to all public records held by State agencies, regardless of whether the record supports or is contrary to a governmental action or policy. Third, Petitioners claim that strict scrutiny is required because the PRA "imposes heavy disclosure costs[.]" Petrs.' Br. 43. The fallacy of this claim is discussed below.

Petitioners' far-reaching position, if accepted by this Court, would undermine public records laws throughout the Country. It would impose new barriers to the public's rights of access by encouraging constitutional challenges to public records requests whenever (as is often the case) the record happens to mention an individual. The Court should reject Petitioners' broad arguments, which rest on specious factual grounds and on reasoning that is contrary to this Court's precedent. Regardless of how this case is resolved, the Court need not and should not declare that the cost of access to public records is suddenly too high to bear. Disclosure of public records, in this case and as a general matter, serves compelling interests, and the PRA is sufficiently narrow to meet any level of scrutiny.

A. Time and Experience Confirm the Compelling Interests Served by Public Records Statutes, and by Disclosure in This Case

Petitioners contend that "[t]ime, experience, and studies have revealed the true costs inflicted by disclosure," and that the "costs of disclosure" support imposing strict scrutiny "to each application of a disclosure statute." Petrs.' Br. 43. They ask this Court to declare as outdated, in all public disclosure contexts, its long-standing recognition that "sunlight is the best of disinfectants."[13] *Id.*

Petitioners could not be more wrong. Disclosure under the PRA is not in tension with the First Amendment, but continues to further its very purpose. As this Court has long recognized, ready access to public records and, more generally, the free flow of information on matters of public concern, is a core constitutional value. *See, e.g., Favish*, 541 U.S. at 172 (access to public records is "a structural necessity in a real democracy"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572

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[13] Petitioners attribute this statement to *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), but it originated in an article by future Justice Brandeis, first published in *Harper's Weekly* in 1914, which extolled the work of the House of Representatives' "Pujo Committee" in publicizing abuses by the banking industry and rooting out corruption. *See* Louis D. Brandeis, *Other People's Money* 92 (Frederick A. Stokes ed. 1914); Melvin I. Urofsky, *The Value of 'Other People's Money,'* N.Y. Times, Feb. 6, 2009, at A21. Justice Brandeis called for continued public disclosure as a necessary and effective means of preventing further abuses of the public's trust.

(1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."); *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("informed and critical public opinion" essential to "protect the values of democratic government"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("informed public opinion is the most potent of all restraints upon misgovernment"). The compelling interest in upholding strong public records laws is also supported by the related First Amendment right to receive information, particularly regarding public and political information. "It is now well established that the Constitution protects the right to receive information and ideas.... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citations omitted).[14]

The need for robust public records disclosure has not abated. News organizations across the country regularly rely on records statutes like the PRA to uncover and report on issues of extreme public importance, including the operation of elections and ballot measure campaigns. For

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[14] *See also Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The right of freedom of speech ... includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read[.]"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse ... sources is essential to the welfare of the public").

example, after Washington State's disputed gubernatorial race in 2004, *The Seattle Times* relied on access to poll books and voting records to examine allegations of dead-voter fraud. Jonathan Martin, et al., *Voting by dead people isn't always a scam*, The Seattle Times, Jan. 7, 2005, at A1, available at http://tinyurl.com/Dead-Voters. The *Times* found 22 instances where the dead were credited with voting, in a statewide election decided by a mere 129 votes. In 2008, the *Sun Sentinel* (Ft. Lauderdale, Fla.) reviewed the voting rolls for Palm Beach County, and found more than 65,000 ineligible and duplicate voters, including one woman who had been dead 23 years and a felon whose criminal record included voter fraud. Peter Franceschina et al., *Mattie Lee Blitch died in 1985 . . . and she's still registered to vote*, Sun-Sentinel, Oct. 29, 2008, at A1. In 2006, *The Atlanta Journal Constitution*'s analysis of a statewide voter registration database found many instances where people listed false addresses, such as schools, Atlanta's city hall and the county's own election office, even though Georgia law requires voters to provide accurate home addresses. Alan Judd, *Registration in Georgia: Bogus addresses clutter voter rolls*, The Atlanta Journal-Constitution, Jan. 10, 2006, at 1A. After the disputed 2000 presidential election, *The New York Times* analyzed a database of uncounted ballots and revealed that black precincts had more than three times as many rejected ballots as white precincts. Ford Fessenden, *Examining the Vote: The Patterns*, The New York Times, Nov. 12, 2001, at A17, available at http://tinyurl.com/vote-patterns.

Under Petitioners' view, these stories, and innumerable others about all manner of important public issues, could not be reported to the public unless release of the underlying records survived strict scrutiny. Petitioners' primary basis for proposing this hurdle is a 2007 "study," commissioned by *amicus curie* Institute for Justice, of public attitudes regarding campaign finance disclosure provisions. *See* Petrs.' Br. 43; Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007). The "study" is in fact a public opinion poll, surveying respondents in six states about attitudes toward disclosure and whether they view campaign contribution records before voting. *Id.* at 7, 11. It is doubtful that this study would even constitute admissible evidence, and it has never been subject to cross-examination or to review by any Court. Moreover, the study involves campaign finance disclosure, which is not in issue here; it says nothing at all about public records laws. In any case, First Amendment rights are not determined based on popularity contests, and this study provides no basis to erect new barriers to the public's access to government records in contravention of the will of Washington voters and this Court's precedent.

Petitioners also argue that access to public records should be subjected to greater constitutional scrutiny because "[t]echnology has dramatically altered the disclosure environment" since *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). Petrs.' Br. 46. This Court rightly rejected a similar appeal to technophobia earlier this Term, recognizing that the interests served by public disclosure of campaign

information are furthered, not diminished, by the ready availability of such information on the Internet. *Citizens United v. FEC*, 558 U.S. __, 130 S. Ct. 876, 916 (2010) (citing the amicus briefs submitted in that case by the Institute for Justice (at 13-16) and the Alliance Defense Fund (at 16-22), both *amici* here). The Court noted with approval that "modern technology makes disclosures rapid and informative," *id.*, and explained why technology makes disclosure more, not less, desirable:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. (citations omitted). The same is true in the public records context: the ready availability of records on the Internet, and the relative ease of searching them

in electronic form, makes information about government more accessible. This furthers the core purpose of the PRA and similar records laws.

For all of the reasons set forth above, the State's interest in assuring ready PRA access to the records at issue in this case would be sufficient even if strict scrutiny were applied. The court below found that the State has an interest both in "providing Washington voters with information about who supports placing a referendum on the ballot," and in "preserving the integrity of the election by promoting government transparency and accountability[.]" *Doe*, 586 F.3d at 679. Both of these interests are compelling. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Buckley II*, 525 U.S. at 191. The anonymity proposed by Petitioners would "facilitate[] wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity." *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting). The PRA directly advances the State's interest in securing clean elections by assuring that referendum petitions receive oversight not merely by state officials and the limited number of interested parties (who have access to the petitions as part of the "official" signature canvass, Wash. Rev. Code § 29A.72.230), but also by citizens, who are entitled to know "what their Government is up to," *Favish*, 541 U.S. at 171, and by the press in exercising its watchdog function. The alternative proposed by Petitioners – review by the Secretary of State only, with no public oversight and no public access to the records in his possession – would

deprive Washington citizens of the sovereignty over state government agencies, and the right to control them. "Without the PRA, the public is effectively deprived of the opportunity independently to examine whether the State properly determined that a referendum qualified, or did not qualify, for the general election." *Doe*, 586 F.3d at 680. This concern is not theoretical. As pointed out by Respondents, incidents of fraudulent signature-gathering are well documented. In some instances the fraud was detected only after public disclosure allowed a citizen to discover that his own name had been included on a petition that he did not sign. In other instances, voters were able to correct state officials' errors in disallowing valid signatures

The voter-information interest is likewise compelling. Consistent with the First Amendment right to receive information, Washington voters have a right to know who is supporting the referendum, since these citizens are acting in a legislative capacity. Voters are entitled to evaluate the measure based on whether particular groups, or officials, or neighbors, support putting the referendum to the people. Even the Referendum 71 sponsors, presumably recognizing the value of endorsements and the fact that citizens sometimes evaluate political measures based on who else supports them, identified certain supporters of the measure on the petitions themselves. JA32. But Petitioners now denigrate the value of such disclosure, suggesting it may be used to "spread misinformation." Petrs.' Br. 49; *see also* Br. of *Amicus Curiae* Inst. For Justice at 28 (arguing that citizens "often do not make the best use of" campaign

disclosure information). In other contexts, this Court has rejected as "highly paternalistic" attempts to limit the public's access to truthful information on the ground that some recipients may misapprehend it. *Va. State Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); *accord 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-98, 503 (1996) (plurality opinion); *id.* at 520-23 (Thomas, J., concurring). It should do so here as well. By law, the State of Washington has no "right to decide what is good for the people to know and what is not good for them to know," Wash. Rev. Code § 42.56.030, and neither do the Petitioners. The PRA directly advances the public's compelling interest in understanding who the backers of a referendum petition are, in the same manner as they are entitled to know where their elected legislators stand.

B. The PRA Is Narrowly Tailored and Reflects the Considered Judgment of Washington and Its Voters Regarding The Importance of Ready Access to Public Records

Given that the stated purpose of the PRA is public access to the information used by officials to govern, there can be no less restrictive alternative than disclosure in this case. Moreover, the disclosure of names of those citizens who support placing a referendum on the ballot is necessary to effectuate the State's election integrity interest: no more limited alternative would give the public the ability to assure that referendum petitions are properly verified, and that there has been no fraud or favoritism in the review process. Disclosure also is

the only means of serving the voter-information interest: no other alternative would enable the public to receive complete information about the identity of those acting as citizen legislators.

Nor is the law overly broad by virtue of the fact that some states do not require public disclosure of initiative petitions. States have leeway with respect to the release of such petitions. Washington has chosen not to exempt from disclosure the referendum petitions submitted signed by voters acting as citizen legislators. The PRA is narrowly tailored nevertheless. The statute, as amended over the last 37 years, contains numerous exemptions to disclosure, reflecting the balance fixed by the State between the public's strong interest in access to information about government conduct, and legitimate countervailing interests.

Basic precepts of federalism, and this Court's longstanding recognition of the critical role played by robust public records laws, dictate that the Court not interfere lightly with the choice made by the people of Washington. Petitioners have not provided this Court with a sufficient basis for holding disclosure unconstitutional in this case. More broadly, this Court should reject Petitioners' proposal, in the name of a previously unknown right of anonymity, to place substantial new roadblocks to the free flow of information to citizens.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

Identity of Individual *Amici Curiae*

Advance Publications, Inc., directly and through subsidiaries, publishes over 20 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns, directly or through its subsidiaries, many internet sites and has interests in cable systems serving over 2.3 million subscribers.

Allied Daily Newspapers of Washington, Inc. is a not-for-profit association representing 24 daily newspapers serving the state of Washington and the Washington bureaus of the Associated Press.

The American Society of News Editors, with some 500 members, is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press, founded in 1846, is one of the largest and most trusted sources of independent newsgathering. On any given day, the AP serves thousands of daily newspaper, radio, television, and online customers with coverage in text, photos, graphics, audio and video, reaching more than half the world's population.

The Association of Capitol Reporters and Editors was founded in 1999 and currently has approximately 200 members. It is the only national journalism organization for those who write about state government and politics.

Belo Corp. owns twenty television stations, six cable news channels, and the stations' associated Web sites. In Washington State, Belo owns broadcast stations KING in Seattle, KREM and KSKN in Spokane, and Seattle-based cable news station NorthWest Cable News. Nationwide, Belo stations, which include affiliations with ABC, CBS, NBC, FOX, CW and MyNetwork TV, reach more than 14 percent of U.S. television households

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Press, a book publisher responsible for the Economist line of books in the U.S. and Canada; Bloomberg

Magazines, which publishes twelve different magazines each month; and Bloomberg.com.

Cable News Network LP, LLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, operates fifteen cable and satellite television networks; twelve Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than one billion people in more than 212 countries and territories.

Cowles Publishing Inc. is a diversified family-owned corporation that publishes *The Spokesman Review*, a daily newspaper in Spokane, Washington. Cowles Publishing has a number of major affiliates, including Cowles CA Media; television stations KHQ in Spokane, KNDO in Yakima, Washington, and KNDU in Kennewick, Washington; *Journal of Business*; *Nickels Worth* and New Media Ventures.

Cox Media Group, Inc. ("CMG") is a Delaware privately-held corporation. CMG's direct and indirect subsidiaries and affiliates include companies that own and operate a variety of news media, including television stations, radio stations, newspapers and websites in multiple markets throughout the United States, including KIRO in Seattle.

The Daily Herald Company is a subsidiary of The Washington Post Company and publishes *The Herald*, a local daily newspaper in Everett, Washington started in 1901. The Daily Herald also

publishes a monthly business journal, titled *Snohomish County Business Journal*, a weekly Hispanic newspaper designed to serve the entire Puget Sound, and HeraldNet, the main web site for The Herald newspaper.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and owns and operates twenty-nine television and two radio broadcast stations. In the Seattle market, Hearst is the owner-operator of seattlepi.com, the first major metro daily newspaper to go online-only.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers that publish over 1,400 magazines sold at

newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout the United States and the world. The New York Times Company also publishes the International Herald Tribune, The Boston Globe, 15 other daily newspapers and more than 50 Web sites, including NYTimes.com, Boston.com and About.com.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and today has a worldwide circulation of more than 2 million. *Newsweek* offers comprehensive coverage of world events with a global network of correspondents, reporters, contributors and editors covering national and international affairs, business, science and technology, society and the arts and entertainment. Newsweek.com offers the weekly magazine online, daily news updates, Web-only columns from Newsweek's top writers, photo galleries, audio and video reports from correspondents, podcasts, mobile content and archives.

ProPublica is an independent, non-profit newsroom that produces investigative journalism in the public interest. ProPublica is led by Paul Steiger, the former managing editor of The Wall Street Journal. Stephen Engelberg, a former managing editor of The Oregonian, Portland, Oregon and former investigative editor of The New York Times, is ProPublica's managing editor. Established in 2007 and headquartered in Manhattan, ProPublica has a newsroom of 32 working journalists dedicated to investigative reporting on stories with significant potential for major impact. Many of ProPublica's stories are offered exclusively to a traditional news organization (138 such stories in 2009 with 38 different partners), free of charge, for publication or broadcast.

The Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. Since 1896, The Seattle Times has been the Northwest's most trusted source of local news and information.

Tribune Company, is an industry-leading media company, operating businesses in publishing, interactive and broadcasting. In publishing, Tribune's leading daily newspapers include the *Los Angeles Times*, *Chicago Tribune*, *The Baltimore Sun*, *Sun Sentinel* (South Florida), *Orlando Sentinel*, *Hartford Courant*, *Morning Call* and *Daily Press*. The company's broadcasting group operates 23 television stations, including KCPQ Q13Fox in Seattle, WGN America on national cable, and

Chicago's WGN-AM. Popular news and information websites complement Tribune's print and broadcast properties and extend the company's nationwide audience.

Washington Newspaper Publishers Association (WNPA), represents 110 community newspapers in Washington state. WNPA is an advocate for community newspapers, freedom of the press and open government. The association is dedicated to helping members advance editorial excellence, financial viability, professional development, and a high standard of publication quality and community leadership.

The Washington Post Company is a diversified media company that operates newspaper, magazine print and online publishing, television broadcasting and cable television systems. The company owns Cable ONE, serving subscribers in midwestern, western and southern states; Washington Post Media (The Washington Post, washingtonpost.com, Express and El Tiempo Latino); Post-Newsweek Stations (in Detroit, Houston, Miami, Orlando, San Antonio and Jacksonville); The Slate Group (Slate, TheRoot.com, DoubleX, TheBigMoney.com and Foreign Policy); The Gazette and Southern Maryland Newspapers; The Herald (Everett, Washington); and Newsweek magazine (Newsweek.com).

Washington State Association of Broadcasters first organized in 1935, is a not-for-profit trade association for radio and television. WSAB represents all of the free, over-the-air radio and television stations (commercial and noncommercial) in Washington State.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DOE, ET AL ,
Petitioners,

v

SAM REED, ET AL ,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the identities of citizens exercising direct legislative power must be shielded from disclosure under state public records laws

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States [1] They have a compelling interest in the issue presented in this case whether persons who sign petitions placing referenda on a state ballot may resist public disclosure of their names

Many States have public records acts, like the Washington statute at issue in this case, that serve vital public interests by effectuating transparency in government All but one of the 24 States that have initiative and referendum procedures disclose petition signatories as public records Local governments also make provision for the release of information regarded by residents as bearing significantly on government activity But the argument advanced by petitioners here, if accepted, could greatly undermine the effectiveness of such regimes, threatening to disrupt many settled areas of state administration Petitioners' argument for anonymity also runs counter to the fundamental nature of the referendum, which is a form of direct legislation *Amici* therefore submit this brief to assist the Court in the resolution of this case

SUMMARY OF ARGUMENT

In their briefs, respondents explain the controlling legal doctrine that supports the holding below

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[1] Pursuant to Rule 37 6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission The parties' letters consenting to the filing of this brief have been filed with the Clerk

Amici take a different focus in this brief. We address both the character of state referenda and the practical implications of petitioners' theory—both considerations that bear on the proper outcome here

First, it is of central importance that referenda are acts of direct legislation The movement that gave rise to the modern referendum, which grew out of the historic town meeting, conceptualized it as making each citizen a legislator That is the character of the Washington referendum, which involves an exercise of the people's reserved right to legislate And as a legislative act, full public disclosure of the referendum's supporters is essential to the proper functioning of the referendum, the notion of anonymous legislating is chimerical

Second, public disclosure in this and related contexts serves vital purposes It is essential to combat fraud and to support a fully informed electorate For this reason, all States have public disclosure regimes that would be undermined by petitioners' theory In addition, the expansive implications of petitioners' demand for anonymity would have greatly disruptive effects in many areas of the law, calling into question the legitimacy of such settled practices as open electoral caucuses, public availability of voter registration information, and campaign finance disclosure Petitioners have not offered the justification necessary for the Court to take such a radical step

I. A WASHINGTON REFERENDUM IS A LEGISLATIVE ACT.

In May 2009, the Washington State legislature passed legislation extending the rights of same-sex couples In response, opponents of the measure sought to repeal it by popular referendum, a process

that authorizes citizens, by petition, to put a newly enacted law to an up-or-down vote of the statewide electorate When transparency groups attempted to obtain the petition signatures via Washington's Public Records Act (PRA), Wash Rev Code § 42 56 001 *et seq* , petitioners opposed the effort on the ground that persons who signed the petitions would be subject to harassment if their identities were revealed But petitioners' asserted desire to preserve their anonymity misunderstands the character of acts taken to place a referendum on the ballot such conduct is a legislative act that, by its nature, is public

1 To begin with, as respondent Washington Coalition for Open Government demonstrates, a referendum is a legislative act under the Washington State Constitution Resp WCOG Br 11-13 (citing, *e g* , *State ex rel Mullen* v *Howell*, 181 P 920, 926 (Wash 1919) ("Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of the state")), see also Resp Reed Br 24-25 (citing decisions by other state courts finding that the referendum is a legislative act) The Washington Supreme Court thus recently explained that, as a matter of state law, "[a] referendum * * * is an exercise of the reserved power of the people *to legislate*" *Belas* v *Kiga*, 959 P 2d 1037, 1040 (Wash 1998) (emphasis added) This characteristic of referenda is of central importance here

Although South Dakota was the first State to adopt the modern initiative and referendum in 1898, the referendum process had its origins in the New England town meeting and early state constitutional referenda, public acts of direct democracy and popular sovereignty Dating back to the seventeenth cen-

tury, townspeople in the American Colonies gathered in meetings to propose ordinances, debate these proposals, and vote openly on them David D Schmidt, *Citizen Lawmakers The Ballot Initiative Revolution* 3-4 (1989), Joseph F Zimmerman, *The Initiative Citizen Law-Making* 2-3 (1999) A process similar in spirit to the New England town meeting, voter ratification of state constitutions by statewide referendum was adopted by several States after the Revolution Schmidt, *Citizen Lawmakers*, at 4 These referenda were held in open town and plantation meetings Zimmerman, *The Initiative*, at 8

In the late nineteenth and early twentieth centuries the Populists, and later the Progressives, championed a return to this sort of direct democracy and popular sovereignty James Sullivan, one of the first American theorists to support the initiative and referendum movement, drew inspiration from the emergence of the initiative and referendum in Switzerland beginning in the 1860s The Swiss had sought to revive aspects of a seventeenth-century tradition similar to the New England town meeting, the "*Landsgemeinde*," an "annual open-air meeting[] where all the men in a canton would vote on the policies of the local government " Schmidt, *Citizen Lawmakers*, at 5, see also Joseph F Zimmerman, *The Referendum The People Decide Public Policy* 3 (2001)

The goal of the Populists and Progressives was the transposition of the New England town meeting into a figurative assembly on a statewide scale, enabling each adult citizen to have his or her say in government The notion was that this would create "citizen lawmakers" who could "revitalize legislative decision-making and invigorate citizen participation "

Zimmerman, *The Initiative*, at 4 As William Jennings Bryan urged at the Ohio Constitutional Convention in 1912 "The initiative and referendum do not overthrow representative government—they have not come to destroy but to fulfil The purpose of representative government is to represent, and that purpose fails when representatives misrepresent their constituents" William Jennings Bryan, *The People's Law* 11 (1914)

In the first decades of the twentieth century, the movement found success, particularly in the West, where several States adopted the initiative and referendum in their constitutions to encourage "voters taking into their own hands the responsibility for determining public policies on important issues in the event a legislative body failed to establish a policy favored by a majority of the voters" Zimmerman, *The Initiative*, at x By 1917, "only three states were without provision for [initiative and referendum] on at least one level of government" Schmidt, *Citizen Lawmakers*, at 10

In the Progressive and New Deal eras, reformers used such ballot initiatives to pass measures in a number of States aimed against government corruption, inefficiency, and unresponsiveness These initiatives included the adoption of primary elections, presidential primaries, direct senatorial elections, public official recall procedures, permanent voter registration, the amendment of budget procedures, reapportionment measures, and limits on campaign spending Schmidt, *Citizen Lawmakers*, at 15-19, see also William B Fisch, *Constitutional Referendum in the United States of America*, 54 Am J Comp L 485, 496-497 (2006) Today, twenty-four States have some form of statewide initiative or popular referen-

dum Initiative and Referendum Institute, *What is the Initiative and Referendum Process?*, www iandrinstitute org

This Court accordingly has recognized both the town meeting and the referendum as public acts of direct democracy "The reservation of such [legislative] power [to the people] is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes The referendum, similarly, is a means for direct political participation * * *" *City of Eastlake* v *Forest City Enters , Inc* , 426 U S 668, 672-673 (1976) (footnote omitted) Thus

> [a] referendum * * * is far more than an expression of ambiguously founded neighborhood preference It is the city itself legislating through its voters an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest

Id at 678 (quoting *Southern Alameda Spanish Speaking Organization* v *Union City*, 424 F 2d 291, 294 (1970)) See also *City of Cuyahoga Falls* v *Buckeye Cmty Hope Found* , 538 U S 188, 199 (2003) (finding that the referendum provides the people the "power to govern")

2 Because referenda are legislative in character, the gathering of signatures in public, and the identification of the signatories, has always been integral to the referendum process See generally Note, *Making Ballot Initiatives Work Some Assembly Required*, 123 Harv L Rev 959 (2010) (discussing the benefits of deliberation in ballot initiatives) Supporters tra-

ditionally "would bring petitions to meetings of civic groups and churches, and people would debate the merits of the proposal as they considered whether to sign" Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex L Rev 1845, 1850 (1999) Signature drives thus were treated as "occasions for public deliberation" *Ibid*, see also Thomas E Cronin, *Direct Democracy The Politics of Initiatives, Referendum, and Recall* 62, 207-219 (1989)

That process continues today As the court below noted, governments that make signature sheets available under public record laws reinforce ongoing discussions "triggered between people that already have a personal connection like friends, relatives, and neighbors" Pet App 9a n 4 This interest helps to explain why the people of Washington, who enacted Washington's public records law themselves via the referendum process, declared that keeping the people "informed" will "assure that the public interest will be fully protected" Wash Rev Code § 42 56 030 [2]

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[2] Where growing populations preclude intimate community discussions, "deliberation over the internet or engagement through phone conversations may be better than no discussion at all" Note, *Making Ballot Initiatives Work*, at 970 The Internet has kept a previously public process accessible to citizens who increasingly communicate electronically with members of their communities For example, social networking websites now serve as a primary outlet for political discussion See, *e g*, Jane S Schacter, *Digitally Democratizing Congress? Technology And Political Accountability*, 89 B U L Rev 641, 659 (2009) ("More commonly, users interact with one another on political matters in cyber-communities, such as those created on blogs, listservs and, increasingly, social network sites like Facebook and MySpace") Third-party sites like the Center for Responsive Politics' opensecrets org also make it easy to find out "which of

This element of disclosure and public scrutiny is an essential aspect of the legislative—and thus of the referendum—process The Washington Constitution requires that the "doors of each house shall be kept open" when the legislature is in session, "except when the public welfare shall require secrecy " Wash Const Art II, §11 Moreover, "[n]o bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same shall be entered on the journal of each house * * * " *Id* § 22 The point is confirmed by Washington statute

> No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public * * * No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot Any vote taken in violation of this subsection shall be null and void * * *

Open Public Meetings Act, Wash Rev Code § 42 30 060(1)-(2) [3]

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your friends, relatives, and neighbors gave how much money to which candidates in recent Presidential elections " See Michael C Dorf, *Is There a Constitutional Right to Sign a Petition Anonymously?*, FindLaw, Nov 16, 2009, http //writ news findlaw com/dorf/20091116 html

[3] Courts in other States have broadly construed laws advancing open government See, *e g* , *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21* v *Superior Court*, 165 P 3d 488, 496 (Cal 2007) ("Public visibility breeds public awareness which in turn fosters public activism[,] politically and subtly encouraging the governmental entity to permit public participation in the discussion process "), *Bd of County Comm'rs* v *Costilla County Conservation Dist* , 88 P 3d 1188, 1195 (Colo 2004) ("We agree that the OML [Open Meeting Law] should be construed as

3 Shielding the names of the signatories whose actions placed a referendum before the statewide electorate therefore would depart from settled practice and run directly counter to the theory of direct legislation But in nevertheless arguing for the right to preserve anonymity, petitioners point to what they describe as the danger of harassment by opponents See Pet Br 45-56 Respondents explain why this contention is overstated See Resp Reed Br 21-22, Resp WAFST Br 21-24, 34-38, Resp WCOG Br 11, 49-51, 53-54 Even if complaints or harassment by political rivals were a substantial risk in this context, however, that would not carry the day for petitioners The notion of legislative anonymity is chimerical

Historically, elected legislators have been subject to public protest, "uncomfortable" conversations with voters, and even occasional confrontations far more threatening than anything faced by petition signatories in Washington See, *e g* , *Cross Burned on Lawn of Rayburn Residence*, N Y Times, July 27, 1956, at 5 (a "cross was burned on the front lawn of the home of Sam Rayburn, Speaker of the House" as debates were underway regarding civil rights legislation),

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broadly as possible to increase governmental transparency when the meeting at issue is one where the public may legitimately take part in or gain insight into the policy-making process "), *State ex rel Newman* v *Columbus Twp Bd* , 735 N W 2d 399, 404 (Neb Ct App 2007) ("The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public "), *State ex rel Citizens for Responsible Dev* v *City of Milton*, 300 Wis 2d 649, 655-656 (Wis Ct App 2007) ("We are guided, at the outset, by the Open Meetings Law's express public policy of ensuring public access to the workings of government and its mandate of liberal construction ")

Clayton Knowles, *Five Congressmen Shot in House by 3 Puerto Rican Nationalists*, N Y Times, Mar 2, 1954, at 1 (Puerto Rican nationalists shot at representatives deliberating on an immigration bill) [4] And although petitioners maintain that the danger of harassment faced by petition signatories is a newly generated creature of the Internet age, that is not so, such a risk has always been present See Thomas Goebel, *Direct Democracy in America, 1890-1940 A Government by the People* 169 (2002) (organizers of a counter-campaign against a 1937 single-tax initiative in California "offered to purchase petitions, intimidated circulators with threats of losing welfare benefits, visited them at home (after obtaining their addresses from compliant county clerks), and organized a skillful campaign of harassment that slowed the collection effort to a crawl"), *Threats Cited in Drive to Recall Reagan*, L A Times, July 19, 1968, at 26 (organizers of an effort to recall then-California Governor Reagan were the victims of threats, intimidation, and physical attack, and the recall office was vandalized and defaced)

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[4] Threats predicated upon government decisions continue to bedevil elected officials, though there has been no suggestion that criminal laws are inadequate to punish unlawful threats or that legislators' votes or identities should be kept secret See, *e g*, *Pelosi, GOP, Decry Threats Against Congress*, N Y Times, March 25, 2010, http //www nytimes com/aponline/2010/03/25/us/AP-US-Health-Care-Threats html (describing threats in connection with recent health care legislation such as a "fax bearing the image of a noose A bullet through a window Bricks thrown, a gas line cut"), Philip Rucker, *Former Militiaman Unapologetic for Calls To Vandalize Offices over Health Care*, Wash Post, Mar 25, 2010, http //www washingtonpost com/wp-dyn/content/article/2010/03/25/AR2010032501722 html

In neither event, however, have such dangers ever been thought to justify legislative anonymity, whether for elected legislators or for petition signatories Instead, this danger is generally addressed by penalizing persons who engage in threatening or destructive behavior As respondent Washington Coalition for Open Government explains, Resp WCOG Br 53-54, Washington state law has effective methods to penalize and deter such misconduct without sacrificing the State's compelling interest in legislative disclosure Thus, Washington provides criminal and civil penalties for harassment, specifically including the harassment of a petition signature gatherer See Wash Rev Code § 9A 46 010, *et seq* (2009), Wash Rev Code § 9A 46 110 (2009), Wash Rev Code § 9 61 230 (2009), Wash Rev Code § 9 61 260 (2009), Wash Rev Code § 29A 72 110 (2005)

Finally, it is worth noting that the form of legislative "anonymity" petitioners seek is highly selective The petitions at issue here requested the e-mail addresses of signatories, a datum neither required by statute nor used by the Secretary of State in processing the petitions See Resp Reed Br 34-35 The idea that the petition organizers could publicly solicit, retain, and exploit the contact information of the citizen-legislators for their own fund raising and other purposes, but then preclude other members of the public from uncovering the identities of the petition's signatories, finds support neither in this Court's precedents nor in common sense

II. RECOGNITION OF A RIGHT TO ANONYMITY WOULD FOSTER FRAUD AND UNDERMINE VITAL DISCLOSURE LAWS.

The legislative nature of the referendum itself mandates public disclosure of petition signatories

But beyond that, disclosure serves compelling public interests related to "the integrity and reliability of the initiative process" *Buckley* v *Am Constitutional Law Found* (*Buckley II*), 525 U S 182, 191 (1999) Application of the PRA in this context furthers the State's interest in fostering "government accountability and transparency" *Ibid* See also *Eu* v *San Francisco County Democratic Cent Comm*, 489 U S 214, 231 (1989) ("A State indisputably has a compelling interest in preserving 'the integrity of the election process") Indeed, the PRA is akin to voter identification requirements and bans on write-in and fusion candidates, all of which have been upheld as reasonable election regulations See *Crawford* v *Marion County Election Bd*, 128 S Ct 1610, 1624 (2008) (plurality opinion) (voter ID law), *Burdick* v *Takushi*, 504 U S 428, 441-442 (1992) (write-in candidates), *Timmons* v *Twin Cities Area New Party*, 520 U S 351, 369-370 (1997) (anti-fusion law)

A. Prohibiting Disclosure Will Undermine The State Interest In Combating Fraud In The Political Process.

1 This Court has recognized that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government" *Purcell* v *Gonzalez*, 549 U S 1, 4 (2006) (per curiam) States undeniably have a "compelling interest" in acting to minimize voter fraud *Ibid* And the danger of both fraud and of hidden machinations of well-funded special interests is very real in the referendum context

From the beginning, the referendum process became subject to some of the same corruptive forces that it had been designed to eradicate "In a highly ironic development * * * the same economic interests

that direct democracy was originally supposed to rein in and even eliminate became important players in initiative and referendum politics" Goebel, *Direct Democracy*, at 7 Petition circulation became commercialized as early as the first decades of the twentieth century Political professionals are often paid per name, receiving a fee for each petition signature they secure See Dina E Conlin, Note, *The Ballot Initiative in Massachusetts The Fallacy of Direct Democracy*, 37 Suffolk U L Rev 1087, 1098 n 84 (2004) Ample funding is "becoming a necessary component" of the effort to qualify a referendum for the ballot, and "wealthy groups have a disproportionate ability" to succeed in this effort Garrett, *Money*, at 1849, 1847 [5] Payment per signature greatly increases the likelihood of irregularity in the procurement of signatures

In addition, apart from the role of disclosure in combating outright corruption, more information—necessarily—leads to a more informed electorate Although petitioners assume that voters gain little information from learning the identities of petition signatories, the simple fact is that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and mes-

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[5] "The record amount of spending on a single proposition is $154 million on California's Proposition 87 in 2006, which would have placed a windfall profits tax on oil companies A handful of other measures have exceeded $100 million in spending—but in every case the measures had significant financial ramifications for an industry with deep pockets gambling, oil, tobacco, or insurance" Initiative and Referendum Institute, *Same-Sex Marriage Breaking the Firewall in California?*, 2 Ballotwatch 2 (2008), http //www iandrinstitute org/BW 2008-2 (Marriage) pdf

sages" *Citizens United* v *FEC*, 130 S Ct 876, 916 (2010) For example, analysis of petition signatures could reveal that a proposition was put on the ballot by a narrow special interest, such as a three-strikes referendum receiving its primary support from prison guard unions See California Correctional Peace Officers Association, *Our History*, http //www ccpoa org/union/about/our_history (prison union "strongly backed" the three strikes initiative)

2 Against this background, public disclosure regimes, which can be used to help police the integrity of the referendum and election processes, serve essential purposes "All states now have some form of freedom of information statute analogous to the federal Freedom of Information Act (FOIA), as well as a variety of open meeting and other 'sunshine' laws" Steven F Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm & Mary L Rev 221, 227 (2003) And States and many local governments have enacted public records acts to encourage transparency in government See, *e g*, Alaska Public Records Act, Alaska Stat § 40 25 110 (West 2010), Illinois State Records Act, 5 Ill Comp Stat 160/1 5 (2010), Massachusetts Public Records Law, Mass Gen Laws Ann ch 66, § 10 (West 2010), see also Daniel J Solove, *Access and Aggregation Public Records, Privacy and the Constitution*, 86 Minn L Rev 1137, 1161 (2002) (noting that "all fifty states have open records statutes, a majority of which are modeled after FOIA") These statutes provide each citizen with a right to access all public records [6] Washington—like most States—broadly de-

[6] Public Records Acts establish open access to petition signatures, but do not mandate how proponents use the signatures Those who request access to the signatures use them for a vari-

fines public records to include "any writing containing information relating to the conduct of government * * * retained by any state or local agency" Wash Rev Code § 42 17 020(42) (2010) Under these statutes, the public has an unqualified right to inspect public records—including petitions

Every State but California with an initiative and referendum process—23 in all—discloses petition signatures as public records See Resp WAFST Br 34 [7] Municipalities also often readily provide access to petition signatures See, *e g* , Cuyahoga County of Ohio Board of Elections, *Candidate FAQs*, http //boe cuyahogacounty us/en-US/cfaqs aspx ("[T]he act of signing a petition is a voluntary act by the signer, so the signer chooses to disclose his or her address in a document that becomes a public record ") A ruling in petitioners' favor would frustrate these disclosure practices And that, in turn, would undermine the integrity of the electoral and legislative processes

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ety of purposes See Resp Reed Br 34-35 For example, national political parties have used lists of petition signatures to build extensive voter outreach databases William Yardley, *Privacy Looms Over Gay Rights Vote*, N Y Times, Oct 31, 2009, at A24 Others have used petition signatures to compile lists of campaign contributors *Public Records Online The National Guide to Private & Government Online Sources of Public Records* 22 (Michael L Sankey & Peter J Weber eds , 4th ed 2003)

[7] See, *e g* , Colo Rev Stat Ann § 1-40-116(2) (West 2010), Idaho Code Ann § 34-1806 (West 2010), Nev Rev Stat Ann § 295 0585 (West 2010), Utah Code Ann § 20A-7-206 (West 2010), Arkansas Secretary of State, *2010 Initiatives and Referenda*, at 14, http //www sos arkansas gov/elections/elections_pdfs/2010_I_R pdf, *Florida Petition Form*, http //election dos state fl us/initiatives/fulltext/pdf/50667-1 pdf

To be sure, States have sought to combat "flagrant examples" of voter fraud with varying methods of verifying voter eligibility at the polls See *Crawford*, 128 S Ct at 1619 (plurality opinion), see also *id* at 1619 n 12 (discussing voter fraud in Washington) States increasingly rely on statistical sampling to verify a random set of signatures See Caroline J Tolbert, Daniel H Lowenstein & Todd Donovan, *Election Law and Rules for Using Initiatives*, in *Citizens as Legislators* 37-38 (Shaun Bowler et al , eds , 1998) But States also have relied on public scrutiny under public record acts to supplement state enforcement And for good reason Limited public resources mean that state efforts at curbing voter fraud will be more effective when assisted by the scrutiny of highly motivated individuals

Recent history demonstrates the efficacy of anti-fraud efforts by private parties A recent complaint filed in Pennsylvania, for example, alleges "forgery and fraud" in the signatures submitted by a candidate for the United States House of Representatives Sean J Miller, *Meehan's Signatures Face Court Challenge*, The Hill, Mar 18, 2010, http //thehill com/blogs/ballot-box/house-races/87673-meehans-signatures-face-court-challenge [8] A ruling

[8] Similar signature challenges have occurred at all levels of government See Kate Zernike, *Court Strikes Nader from Pennsylvania Ballot*, N Y Times, Oct 14, 2004, http //www nytimes com/2004/10/14/politics/campaign/14nader html, Borys Krawczeniuk, *McGuigan Knocked Off State Representative Ballot*, Times-Tribune (Scranton), Mar 26, 2010, http //thetimes-tribune com/news/mcguigan-knocked-off-state-representative-ballot-1 699547, Stephen Stirling, *Three Queens Candidates Knocked Off Ballot by Board of Elections*, Boro Politics, Aug 5, 2009, http //www boropolitics com/stories/1/2/01_02_challenges_wrapup html, Drew Griffin &

in petitioners' favor would unduly limit the ability of the public and candidates to verify the authenticity of signatures on petitions and ballot access forms

B. Petitioners' Privacy And Intimidation Exceptions Would Endanger Other Election Regulations That Mandate Disclosure.

Petitioners' argument endangers the political process for other reasons Their legal theory could require anonymity in any public act involving voting, petitioners argue for an "intimidation exemption" that would apply when a group is able to demonstrate that disclosure would "subject [supporters] to threats, harassment, or reprisals from either Government officials or private parties" Pet Br 25-26 (quoting *Buckley* v *Valeo*, 424 U S 1, 74 (1976)) This would call into question the enforceability of a host of state election laws, most notably the candidate-selection caucus and the release of voter registration information Additionally, the logic of petitioners' argument would insupportably expand the intimidation rationale governing campaign finance disclosure

1 Caucuses

Petitioners correctly recognize that "it is unnecessary here to decide whether the Constitution requires secret ballots * * *" Pet Br 19 While it is true that every State now utilizes secret ballots for general elections, *id* at 19 n 23, many state political

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Kathleen Johnston, *Obama Played Hardball in First Chicago Campaign*, CNN, May 30, 2008, http //www cnn com/2008/POLITICS/05/29/obamas first campaign/index html (describing how Barack Obama successfully challenged petition signatures of opponents in state senate race)

parties use caucuses to select candidates for office Unlike primary elections, which mirror the privacy of the general election voting booth, caucuses occur in public Typically, a caucus meets in a community space—such as a school gymnasium—and voters stand in different sections of the room to indicate support for their candidate See, *e g* , Associated Press, *Some Basic Facts on the Iowa Caucuses*, Yahoo! News, Jan 2, 2008, http //web archive org/web/20080105065613/http //news yahoo com/s/ap/20080102/ap_on_el_pr/iowa_caucuses_q_a The process encourages interaction among party members Thus, petitioners' desire for anonymity would inevitably clash with the laws of many States [9]

Caucuses, by definition, are open and contested meetings Citizens declare their support for a particular candidate, while others lobby for votes Given their public nature, caucuses have the potential to engender intimidation and hard feelings See, *e g* , Editorial, *Change Texas Caucus System*, Dallas Morning News, Mar 12, 2008, http //www dallasnews com/sharedcontent/dws/dn/opinion/editorials/stories/031208dnedicaucuses 481cb2c7

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[9] For example, the Iowa caucuses inaugurate the quadrennial presidential nominating contests During the 2008 election cycle, the Republican and Democratic parties held caucuses in 15 and 14 States, respectively Indeed, Washington's Republican and Democratic parties conduct presidential caucuses See Primary Calendar Democratic Nominating Contests, N Y Times, http //politics nytimes com/election-guide/2008/primaries/democraticprimaries, Primary Calendar Republican Nominating Contests, N Y Times, http //politics nytimes com/election-guide/2008/primaries/republicanprimaries Because caucuses are more time-intensive and deliberative than primary elections, many state parties prefer them as indicators of commitment to a candidate

html (describing a Texas Democratic presidential caucus that "nearly turned violent") Indeed, the possibility of confrontation is likely greater in the caucus than in the referendum context A crowded room full of people engaged in heated political debate is at least as likely to provoke threats as is the large-scale release of petition signatures on the Internet A ruling in favor of petitioners' intimidation theory thus could instigate legal challenges to longstanding caucus procedures [10]

2 Voter Information

Many States make voter information public See Solove, *Access and Aggregation*, at 1144 Illinois, for example, maintains a website that allows users to verify whether an individual is registered to vote See *Am I Registered to Vote in Illinois?*, http //www elections state il us/VotingInformation/RegistrationLookup aspx Similarly, Maryland's Board of Elections permits Internet users who know an individual's full name, zip code, and date of birth to discover whether that person is registered to vote, as well as the person's mailing address and party affiliation See *Maryland Elections Center*, http //www mdelections org/voter-registration/status And Virginia authorizes the release of voter information to candidates, PACs, and political parties See Fredick Kunkle, *Va Investigates Legality of Access to Voter List*, Wash Post, Oct 30, 2009,

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[10] This Court has often entertained constitutional challenges to political party primaries See, *e g*, *Tashjian* v *Republican Party of Connecticut*, 479 U S 208 (1986) (invalidating closed primary law on First Amendment grounds), *Smith* v *Allwright*, 321 U S 649 (1944) (holding that the Democratic Party's "white primary" violated the Fifteenth Amendment)

http //www washingtonpost com/wp-dyn/content/article/2009/10/29/AR2009102904427 html

Given the political saliency of voter information, it is unsurprising that voter rolls are often compiled and sold for get-out-the-vote (GOTV) drives, fundraising, and outreach purposes Several firms specialize in assembling and disseminating this information See E-Merges, https //www e-merges com/voter-lists html ("This site enables you to create your own customized mailing list of registered voters "), GOTVoters Online, http //www voter-lists com/voter-lists cfm (providing voter information that includes mailing address, party affiliation, phone number, race, and participation rate) While individuals such as prosecutors and judges may seek to keep their addresses and associated information private for fear of job-related retaliation, this is done at the request of the individual rather than through blanket recognition of anonymity See, *e g* , Md Code Regs tit 33, § 04 02 02 (2010) But this longstanding regime, too, is threatened by petitioners' theory

3 Campaign Finance Disclosure Rules

Finally, petitioners' core argument is that the alleged intimidation that occurred during California's Proposition 8 campaign would be repeated in Washington if the petition signatures were disclosed See Pet Br 31-35 Petitioners' conflation of the California example with the situation in Washington is misguided on many levels, but it is important to recognize—as even petitioners do—that the now-famous Proposition 8 maps were compiled using "the names, employers, and contact information of Proposition 8 campaign *contributors* from public filings " *Id* at 2 (emphasis added) Because California's Public Records Act explicitly exempts initiative signatures

from its ambit, Cal Gov't Code § 6253 5, the *sine qua non* of the California controversy was not petition signatures at all, but campaign contributions [11]

That this case instead arises in the petition signature context reduces the force of the California comparison When an individual's campaign donation is disclosed, the inescapable assumption is that the donor supports the election of the candidate or cause that received monetary support But when a citizen signs an initiative petition, the story becomes ambiguous An individual may sign a petition because he or she believes in the cause advocated by the sponsor of the referendum, alternatively, the individual may sign because of faith in the people as sovereign and a desire to support direct democracy, or simply because he or she did not pay much attention to the petition when solicited by a professional signature collector to sign while boarding a bus or attending a state fair See Pet Br 50 ("At the petition stage, the question is merely whether the people should have the final say ") Given the many possible reasons why a voter may sign a petition, the specter of harassment and intimidation is greatly reduced in such circumstances In any event, campaign contributors to the Washington referenda will eventually have their identities revealed, as *every* State that has referenda requires contribution disclosure See Dick M Carpenter II, *Disclosure Costs Unintended Consequences of Campaign Finance Reform* 1 (2007), http //www ij org/images/pdf_folder/other_pubs/ DisclosureCosts pdf

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[11] Tellingly, a district court has already rejected petitioners' intimidation argument in the Proposition 8 context See *Protect-Marriage com* v *Bowen*, 599 F Supp 2d 1197 (E D Cal 2009)

Nevertheless, petitioners' argument stems from this Court's campaign finance case law, which has long recognized that disclosure requirements "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed" *Citizens United*, 130 S Ct at 916 (citing *McConnell* v *FEC*, 540 U S 93, 198 (2003)) But given the strong anti-corruption rationale for campaign finance regulation, the Court has drawn the intimidation exemption narrowly

In *Brown* v *Socialist Workers' '74 Campaign Comm* , 459 U S 87 (1982), the Court exempted a minor political party from disclosure requirements because it was "historically * * * the object of harassment by government officials and private parties" *Id* at 88 Petitioners, however, would expand *Brown*'s intimidation exception to swallow the rule Rather than protect a small political party subjected to years of harassment by state and private actors, petitioners seek to shelter the names of more than 100,000 individuals who favored a referendum that received substantial public support

Once the intimidation rationale is extended in this manner to cover any issue of public controversy no matter the depth of public support, there is no limiting principle Indeed, as respondent Washington Families Standing Together points out, much of petitioners' evidence of harassment "includes emails to the campaign manager of Referendum 71, a public figure broadly identified with the campaign, not an individual signer" Resp WAFST Br 60 n 15 If threats to campaign leaders—rather than individual petition signatories—justifies anonymity, it will be impossible to maintain comprehensive and meaning-

ful systems of campaign finance disclosure Petitioners have offered no justification for taking such a disruptive step

CONCLUSION

The judgment of the court of appeals should be affirmed

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APRIL 2010

AMICUS CURIAE BRIEF

No. 09-559

In the Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, AND BRENDA GALARZA, PUBLIC RECORDS OFFICER FOR THE SECRETARY OF STATE'S OFFICE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF OHIO, ARIZONA, COLORADO, FLORIDA, IDAHO, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the designation of referendum petitions as public records under the Washington Public Records Act, Wash. Rev. Code § 42.56.001 et seq., is a reasonable election regulation subject to review under the balancing test articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992).

2. Whether Washington's compelling interests in preventing fraud, preserving ballot integrity, and promoting open government outweigh any minimal burden on speech created by designating referendum petitions as public records.

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STATEMENT OF AMICI INTEREST

The amici States have a direct interest in the outcome of this appeal. In recent years, States have experienced numerous incidents of election fraud, including both voter fraud and petition fraud. In 2006 alone, the Montana Supreme Court invalidated every signature collected by non-resident petition circulators and three ballot initiatives because the circulators engaged in bait-and-switch tactics; the Oklahoma Supreme Court struck an initiative petition upon finding a pervasive pattern of wrongdoing and fraud in the signature collection process; and a federal district court concluded that circulators misrepresented the purpose of a Michigan initiative petition. And these are but a few examples of recent election fraud.

Each State unquestionably has a compelling interest in preventing election fraud, ensuring the integrity of its elections, and promoting open government. Consistent with these interests, all fifty States and the District of Columbia have enacted reasonable election regulations to prevent fraud and to preserve the integrity of their ballots. In addition, each of the twenty-three States that allow referenda reasonably regulates the referendum petition process. See, *infra*, note 2. Likewise, all fifty States and the District of Columbia have enacted public records and open meetings laws to make government transparent and more accessible to the public. See State Sunshine Laws, available at www.sunshinereview.org/index.php/State_sunshine_laws (last visited Mar. 31, 2010); State Open Meetings Laws, available at www.sunshinereview.org/index.php/State_Open_Meetings_Laws (last visited Mar. 31, 2010). Like other States,

Washington has tied these two regulatory strands by designating referendum petitions as public records. Together these laws function as a reasonable election regulation designed to allow for public oversight of the referendum process.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution permits reasonable election regulations. The State of Washington, like every other State, has adopted a raft of rules to ensure smooth, fair, and open elections that are free of fraud. Among those rules is the State's Public Records Act ("PRA"), Wash. Rev. Code § 42.56.001 et seq., under which referendum petitions are deemed public records.

The application of the PRA to referendum petitions should be evaluated under the balancing test for election regulations set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992). Under that test, strict scrutiny applies only if an election regulation severely burdens protected speech. The public disclosure of referendum petitions imposes no such burden, however, because petition signatures are not protected speech under the First Amendment. And even if signing a petition were protected speech, the intimidation alleged by Petitioners John Doe #1, John Doe #2, and Protect Marriage Washington ("Petitioners") does not suffice to show a severe burden. Since strict scrutiny does not apply, Washington only need demonstrate that it has an important regulatory interest sufficient to justify its reasonable, nondiscriminatory scheme of publicly disclosing referendum petitions upon request.

Washington's decision to make referendum petitions publicly available is amply justified by three compelling state interests: preventing election fraud, preserving public confidence in the integrity of elections, and promoting open government. Petitioners themselves acknowledge two major threats to democracy—intimidation and fraud—but they err in focusing on the former to the exclusion of the latter. Washington has an exceedingly strong interest in forestalling and ferreting out election-related fraud, and "[s]unlight is said to be the best of disinfectants" to fraud. Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (Frederick A. Stokes Co. 1914). The States have an undeniable interest in open government as an end unto itself, and here Washington bolsters that interest by employing open government to prevent election fraud and promote ballot integrity. Washington's public disclosure of referendum petitions does not burden protected speech; indeed, it advances the State's compelling interests in a manner consistent with the goals of the First Amendment.

ARGUMENT

A. Washington's designation of referendum petitions as public records is a reasonable election regulation subject to *Burdick* balancing review.

Washington's regime should be evaluated for what it is: a reasonable regulation of the election process. To the extent the PRA's disclosure requirement works together with the election code to regulate the State's election process, the PRA functions as an election regulation and therefore

triggers *Burdick* review. Cf. Pet. App. 15a & n. 11. Under *Burdick*, strict scrutiny does not apply to election regulations that—as here—impose anything less than a severe burden on protected speech. 504 U.S. at 434.

The Court has long recognized that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). In fact, "[s]ubstantial regulation of elections" is essential if they "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, strict scrutiny does not apply to First Amendment challenges of election regulations, for "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Instead, the Court applies "a more flexible standard," *id.* at 434, designed to let States "weigh the costs and benefits of possible changes to their election codes." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring). The Court allows a State's "judgment [to] prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Id.* at 1626-27.

Burdick therefore established two tiers of scrutiny for challenges to state election laws. 504 U.S. at 434. A court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments

that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). If a regulation "impos[es] severe burdens on plaintiffs' rights," then it "must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 U.S. at 358. But if a regulation imposes a burden that is anything less than severe, then "a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434). Stated another way, "the rigorousness of [the Court's] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434.

B. Public disclosure of referendum petitions imposes minimal burdens, if any, on protected speech.

Washington's practice of designating referendum petitions as public records imposes little, if any, burden on petition signers. Petitioners object that the disclosure of signatures creates "a serious concern over both loss of privacy and intimidation." Pet. Br. 12. They work mightily to raise a specter of "clearly resurgent" intimidation "in the petition-signing context," and liken themselves to victims of the Ku Klux Klan. Pet. Br. 15. But Petitioners' rhetoric is beside the point. When the Court "grapple[s] with the magnitude of burdens," it does "so categorically and [does] not consider the peculiar

circumstances of individual voters or candidates." *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring).

In that light, Petitioners identify no meaningful burden that Washington's regulation imposes on speech. Not only is signing a referendum petition not speech, but designating petitions as public records does not impose any burden on petition signers who have no reasonable expectation of privacy in their signatures in the first place.

1. Signing a referendum petition is an act performed for its legal significance; it is not speech, and certainly not core political speech.

Signing a petition is not speech, but is instead "an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution." Pet. App. 11a & n. 9. When a Washington voter signs a referendum petition, she does so to achieve a distinct legislative end. Any communicative or expressive element of the signature is merely ancillary to this legally operative function, and is not protected by the First Amendment. Moreover, even if signing a petition were expressive conduct, it is not core political speech.

The act of signing a referendum petition does not fit naturally in the realm of core political speech because it is an act of legislative significance: It directs the placement of an issue on the ballot. The Washington Constitution makes clear that signing a referendum petition is a legislative act. See *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) ("A referendum or an initiative measure is an

exercise of the reserved power of the people to legislate.") (internal quotation omitted). Like many other States, the Washington charter expressly reserves certain legislative powers to the people: "[T]he people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature."[1] Wash. Const. art. II, § 1. This power includes the ability to "order" a referendum "on any act, bill, law, or any part thereof passed by the legislature," *id.* § 1(b), if petitions are filed containing the valid signatures of registered Washington voters equaling at least four percent of the votes cast in the most

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[1] Other State constitutions similarly describe the right of referendum as a reservation of legislative power. See, e.g., Ariz. Const. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature . . . , but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."); Colo. Const. art. V, § 1 (The legislative power of the state shall be vested in the general assembly . . ., but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly."); Ohio Const. art. II, § 1 (The legislative power of the state shall be vested in a general assembly . . . but the people reserve to themselves the power to . . . adopt or reject [laws and amendments to the constitution] at the polls on a referendum vote as hereinafter provided.").

recent gubernatorial election, Wash. Rev. Code § 29A.72.150. Moreover, the Governor cannot veto legislation enacted by initiative or referendum. Wash. Const. art. II, § 1(d).

Consistent with this constitutional reservation of power, the Washington legislature has enacted laws to clarify the referendum process. When the people sign a referendum petition, they "respectfully *order and direct*" that the measure in question "be referred to the people of the state for their approval or rejection" in an election. Wash. Rev. Code § 29A.72.130 (emphasis added). "The petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote." *Id.* Every signer must declare: "I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." *Id.*; see also *id.* § 29A.72.140 (requiring the petition to bear a warning that any person who violates this declaration may be fined, imprisoned, or both). Finally, a "petition . . . must consist of not more than one sheet with numbered lines for not more than twenty signatures." *Id.* § 29A.72.100.

After a referendum petition is filed with the Washington Secretary of State, the Secretary must "verify and canvass the names of the legal voters on the petition." *Id.* § 29A.72.230. Representatives of the measure's supporters and opponents may observe this process, but they cannot record the information on the petitions. *Id.* If the Secretary determines that "the requisite number of signatures of legal

voters" have been submitted, he must certify the referendum for the ballot. *Id.* If this threshold number is not met, the Secretary will not certify the measure. *Id.* (also requiring the Secretary to reject a petition that does not include all required information or is untimely). Any citizen who disagrees with the Secretary's determination may seek a writ of mandamus or injunction in the superior court of Thurston County. *Id.* § 29A.72.240 (also authorizing appeals of superior court determinations to the Washington Supreme Court).

Like voting, signing a referendum petition is a discrete and legally operative act. This Court has rejected the contention that voting is speech or expressive conduct on several occasions. "Ballots serve primarily to elect candidates, not as a fora for political expression." *Timmons*, 520 U.S. at 363 (upholding Minnesota's ban on a candidate appearing multiple times on the same ballot as a representative of different parties). Similarly, the Court has explained that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].'" *Burdick*, 504 U.S. at 438 (citations omitted). Indeed, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* "[B]y its very nature, a properly cast ballot does not make any 'statement' apart from its role in the selection of candidates to represent the voters in government." Laurence H. Tribe, *Erog v. Hsub and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 Harv. L. Rev. 170, 243 (2001). Similarly, a legislator's "act of publicly voting

on legislation . . . is quintessentially one of governance." *Spallone v. United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting). Likewise, signing a petition is quintessentially a legally operative act.

Petitioners' contention that signing a petition is unquestionably speech, Pet. Br. 17-23, also disregards the crucial distinction between circulating a petition and signing a petition. The Court's decisions holding that petition circulation is protected First Amendment speech are animated by a desire to promote uninhibited political discussion of candidates and issues. See *Buckley v. Am. Constitutional Law Found.* ("*Buckley II*"), 525 U.S. 182, 186-87 (1999); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). In "almost every case," circulation of a petition "involve[s] an explanation of the nature of the proposal and why its advocates support it." *Meyer*, 486 U.S. at 421. Petition circulation is, therefore, precisely "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22.

But there is a significant difference between laws applicable to "the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006). The right to free speech is implicated "only by the state's attempts to regulate speech *associated* with an initiative procedure," not by the initiative process itself. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1211

(10th Cir. 2002) (emphasis added); accord *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) ("First Amendment rights are not implicated by referendum schemes per se . . . , but by the regulation of advocacy within the referenda process, i.e., petition circulating, discourse and all other protected forms of advocacy.") Petition signatures are an essential element of the referendum process, but they are not advocacy *about* the referendum; they *are* the referendum.

"Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Initiative & Referendum Inst.*, 450 F.3d at 1099; see also *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) ("[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."); but see *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005) (holding that use of the initiative process is expressive conduct). Unlike a petition circulator, a petition signer need not engage in debate or attempt to persuade anyone of his views. Instead, the act of signing a petition is "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 673 (1976); see also *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996) ("[I]n the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether."). A referendum represents an instance of "the [state]

itself legislating through its voters." *City of Eastlake*, 426 U.S. at 678 (quoting *S. Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970)). Thus the act of signing is a legal command to place an issue on the ballot. See *James v. Valtierra*, 402 U.S. 137, 142 (1971) (comparing the referendum process to other legislative devices such as gubernatorial vetoes or filibuster rules). And the First Amendment has nothing to say about that legal command.

2. Disclosing petition signatures would impose minimal, if any, burdens on petition signers.

The people's exercise of their sovereign referendum power is, by its very nature, a public act. And since Washington's disclosure of petition signatures under the PRA simply makes available information that is part of an inherently public process, persons who sign the petitions have no reasonable expectation of privacy in their signatures.

Referenda are an exercise of the people's legislative power and, as such, have always been subject to extensive governmental regulation. Initiatives and referenda have existed in the United States since the seventeenth century. See M. Dane Waters, *Initiative and Referendum Almanac* 3 (Carolina Acad. P. 2003). Alexander Hamilton articulated the rationale for permitting referenda in 1788: "As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority . . . whenever it may

be necessary to enlarge, diminish, or new-model the powers of the government." James Madison, *Federalist 49*, in *The Federalist: A Commentary on the Constitution of the United States* 322 (Robert Scigliano ed., 2001).

Although legislative referenda have been common since the Constitution's enactment, popular referenda first arose across the United States in the late nineteenth century. Waters, *supra* p. 12, at 3. Populists and Progressives encouraged States to adopt statewide initiatives and popular referenda in order to allow citizens to place issues on the ballot. *Id.* Between 1898 and 1918, twenty-four states adopted initiative or popular referendum laws. *Id.* at 4. At present, twenty-three states allow popular referenda. See Initiative and Referendum States, www.ncsl.org/Default.aspx?TabId=16589 (last visited Mar. 31, 2010).

Like all States that allow referenda, Washington carefully regulates its referendum process to ensure that it is fair, orderly, and serves the purpose of giving legislative power to the people.[2]

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[2] Every State authorizing popular referenda extensively regulates the referendum process. See Md. Const. art. XVI; N.M. Const. art. IV, § 1; Alaska Stat. §§ 15.45.250–465; Ariz. Rev. Stat. Ann. §§ 19-101–143; Ark. Code Ann. §§ 7-9-101–125, 7-9-401–415; Cal. Elec. Code §§ 9000–9096; Colo. Rev. Stat. §§ 1-40-101–135; Idaho Code Ann. §§ 34-1801–1823; Me. Rev. Stat. Ann. tit. 21A, §§ 901-906; Mass. Gen. Laws ch. 53, § 22A; Mich. Comp. Laws §§ 168.471-168.488; Mo. Rev. Stat. §§ 116.010–.340; Mont. Code Ann. §§ 13-27-101–504; Neb. Rev. Stat. §§ 32-1402–1416; Nev. Rev. Stat. §§ 293.12756–12795, 293.252–253; N.D. Cent. Code §§ 16.1-01-01–09; Ohio Rev. Code Ann. §§ 3519.01–.22; Okla. Stat. Ann. §§ 34-1-27; Or. Rev. Stat. §§ 250.005–.135; S.D. Codified Laws §§ 2-1-3–18; Utah Code

Washington's election regulations ensure that the process remains subject to public scrutiny. To place an issue on the ballot, a fixed percentage of Washington voters must sign a referendum petition that "respectfully *order[s] and direct[s]*" that a measure "be referred to the people of the state." Wash. Rev. Code § 29A.72.130 (emphasis added). Each signer must provide her name and address, *id.*, and the Washington Secretary of State verifies and canvasses the signatures after the petition is filed, *id.* § 29A.72.230. If enough valid signatures are present, then the Secretary *must* certify the issue for the ballot. *Id.* In other words, whether an issue is certified turns entirely on the action of *the people*; the Secretary only has a ministerial duty to act upon a petition's request to refer a measure to the voting public. See *State ex rel. Heavey*, 982 P.2d at 615. Even as the Secretary verifies and canvasses signatures, the process remains in the hands of the people—representatives of a measure's supporters and opponents may observe the Secretary's work, Wash. Rev. Code § 29A.72.230, and can challenge the Secretary's determination in court, *id.* § 29A.72.240.

Most States with popular referenda administer the process similarly. They constitutionally reserve this power for their citizens, see *supra* note 1, and require a minimum amount of voters to sign each referendum petition.[3] A

Ann. §§ 20A-7-101–103, 20A-7-301–312; Wash. Rev. Code §§ 29.79.010–.500; Wyo. Stat. Ann. §§ 22-24-102–201. See also generally Waters, *supra* p. 12, at Ch. 4 ("State-by-State History and Overview").

[3] All States impose minimum signature requirements to qualify a referendum for the ballot, and some also impose geographic distribution requirements. See, e.g., Alaska Const. art. XI, § 3

designated official then verifies and canvasses the signatures, and determines whether to certify an issue for the ballot.[4] Finally, States generally allow citizens to challenge this certification decision in state court.[5] Further, many States limit the scope of the people's right of referendum with respect to certain categories of legislation.[6]

In light of this reasonable regulation of the referendum process in Washington (and in every other referendum State), no Washington voter could reasonably assume any privacy right in his signature on a petition. See *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) (explaining that "an individual's expectation of confidentiality is relevant to analysis of [FOIA's]

("[T]en percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district."); Idaho Code Ann. § 34-1805 ("[T]he petition must contain a number of signatures of qualified electors from each of twenty-two (22) counties equal to not less than six percent (6%) of the qualified electors at the time of the last general election in each of those twenty-two (22) counties."); Me. Const. art. IV, pt. 3, § 7 ("10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition.").

[4] See, e.g., Ariz. Rev. Stat. Ann. §§ 19-121.01-.02; Cal. Elec. Code §§ 9030-9031; Colo. Rev. Stat. § 1-40-116; Idaho Code Ann. § 34-1807; Me. Rev. Stat. Ann. tit. 21A, § 905; Mont. Code Ann. §§ 13-27-303–307; Wyo. Stat. Ann. § 22-24-116.

[5] See, e.g., Alaska Stat. § 15.45.460; Ariz. Rev. Stat. Ann. § 19-121.03; Ark. Code Ann. § 7-9-112; Colo. Rev. Stat. § 1-40-118; Idaho Code Ann. § 34-1808; Me. Rev. Stat. Ann. tit. 21A, § 905; Okla. Stat. Ann. § 34-8.

[6] See e.g., Alaska Stat. § 15.45.250; Colo. Const. art. V, § 1; Mass. Const. art. XLVIII, pt. III, § 2; N.M. Const. art. IV, § 1.

privacy exemption"). A voter cannot petition for a referendum, and a referendum cannot qualify for the ballot unless a petitioner discloses her identity to the government when filing the petition. Further, the petition signer discloses her identity not only to government officials for verification purposes, see *id.*, but also to "an essentially unlimited segment of the public," Br. of Appellants at 18, *Doe #1 v. Reed*, No. 09-35818 (9th Cir. Sept. 18, 2009). Each signer reveals her name to a petition circulator, to the person or organization who submits the measure to the Secretary of State, and to other members of the public. For example, the Referendum 71 petitions included twenty signatures per page, meaning that the first nineteen signers on a petition revealed their identity to *any* subsequent person who was asked to read and sign the document, whether or not that person signed. The first signer on a completed petition disclosed her identity to at least nineteen subsequent signers. Washington law does not prohibit any of these people from making a list of the signers' names and addresses.

A speaker who discloses her identity has no right to anonymity and certainly no reasonable expectation of privacy. See *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007); cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invalidating requirement that private individuals disclose their identity when publishing political pamphlets). Just as under the Fourth Amendment, "[w]hat a person knowingly exposes to the public . . . is not a subject of protection." *California v. Greenwood*, 486 U.S. 35, 41 (1988) (internal quotation omitted) (finding no legitimate privacy expectation in trash left in an

area "accessible to the public"). In the search-and-seizure context, citizens have no reasonable expectation of privacy in areas observable by airplanes flying overhead, *California v. Ciraolo*, 476 U.S. 207, 213 (1986); in private fields surrounded by no trespassing signs if the fields are publicly accessible, *Oliver v. United States*, 466 U.S. 170, 179 (1984); or when driving on a public road, *United States v. Knotts*, 460 U.S. 276, 281-85 (1983). It is no less true that a person who signs a referendum petition in Washington cannot reasonably expect that his signature will remain private.

Even if petition signers had a reasonable expectation of privacy in their signatures, they would have no First Amendment right to anonymity in this context. As with voting, there is no First Amendment right to anonymity when signing a petition. See *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (recognizing that the secret ballot is a creature of the states, not a federal constitutional guarantee); Steven F. Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265, 291 (2007) (noting that, until 2002, each ballot cast in Arkansas could be traced to a particular voter). Washington specifically chose to guarantee a right to secret ballots, Wash. Const. art. VI, § 6; Wash. Rev. Code § 29A.04.206, but it makes petition signatures a matter of public record. Even if Washington's petition signers were entitled to anonymity at the time they signed a petition, that would not entitle them to absolute anonymity because, once submitted to the Secretary of State, a petition is part of the legislative process and has a legally operative effect. See Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J. L.

& Politics 589, 617 (2001) ("Perhaps anonymity at the time of expression is valued, but an interest in remaining anonymous is by no means absolute."). In *Buckley II*, for example, the Court recognized that petition circulators had a right to remain anonymous while circulating petitions, 525 U.S. at 200, but could be compelled to disclose their identities on an affidavit after the fact, *id.* at 188-89, 205 (leaving intact an unchallenged affidavit requirement).

The PRA imposes little, if any, burden on petition signers in Washington, because petition signatures are not speech and the petition signers have neither a reasonable expectation of privacy nor a right to anonymity. Because the burden is so minimal,[7] *Burdick* dictates that strict scrutiny does not apply. Instead, this reasonable and nondiscriminatory regulation will withstand First Amendment scrutiny if it furthers Washington's

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[7] Notably, to the extent future plaintiffs can demonstrate that the designation of petition signatures as public records imposes a severe burden on their speech, the result of this analysis may differ. Moreover, many State public records laws balance the State's interest in public disclosure against competing privacy interests. For example, Montana enshrines this requirement in its constitution: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II § 9. And other State public records acts require similar balancing. See, e.g., Cal. Gov. Code § 6255 (an agency can withhold a record "by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"); Hawaii Rev. Stat. § 92F-13(1) (disclosure not required if it "would constitute a clearly unwarranted invasion of personal privacy").

"important regulatory interests." *Burdick*, 504 U.S. at 434. It does that in spades.

C. Public disclosure of referendum petitions furthers Washington's compelling interests in preventing election fraud, preserving ballot integrity, and promoting open government.

Washington has compelling interests in preventing fraud, preserving ballot integrity, and promoting open government in the context of its elections. "Preserving the integrity of the electoral process, preventing corruption, and '[sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted & alterations in original). When evaluating a State's interests, this Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 364. Instead, the Court recognizes that States may "respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). For the reasons explained below, Washington's asserted interests outweigh the minimal burdens imposed by the public disclosure of petition signatures and, in fact, are sufficiently compelling to ensure that the State's regulatory scheme would survive even strict scrutiny.

1. States have a compelling interest in preventing election fraud.

This Court has expressly recognized that States have a "compelling interest in preventing voter fraud," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), and this interest naturally extends to other forms of election fraud as well. "Allegations of . . . . fraud and misrepresentation in collecting signatures for ballot initiatives have haunted the process for nearly a century." Jocelyn Freidrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urb. L.J. 889, 910 (2007). Reports of petition fraud have continued apace since the Court last considered a state regulation of the petition circulation process in 1999. See *Buckey II*, 525 U.S. 182. Both real and perceived election fraud can cause considerable harm to state elections systems.

As the Federal Commission on Election Reform explained in 2005, "election fraud is difficult to measure," but "it occurs." *Building Confidence in U.S. Elections*, Report of the Commission on Federal Election Reform 45 (2005), *available at* www.american.edu/ia/cfer/report/full_report.pdf (last visited Mar. 31, 2010). These incidents generally "attract[] public attention and come[] under investigation only in close elections." *Id.* Even so, reported investigations are numerous. For example, during the three-year period between October 2002 and September 2005, the United States Department of Justice launched more than 180 election fraud investigations, and States investigated and prosecuted many more incidents. *Id.*

Washington experienced election fraud as recently as its 2004 gubernatorial election. See *In the Matter of Coday*, 130 P.3d 809, 810 (Wash. 2006) (summarizing the election dispute in the context of subsequent litigation). After two recounts, the Democratic candidate was certified the winner. The Republican Party filed suit, "claim[ing] that hundreds of 'illegal votes'—including votes cast by felons and votes cast on behalf of deceased electors—made the difference in the election" and alleging that "'errors, omissions, mistakes, neglect and other wrongful acts' by county election officials affected the outcome of the election and necessitated its nullification." *Id.* (citation omitted). The trial judge dismissed the suit, ruling that "while the contestants had proved that errors and omissions by county election officials had occurred and that illegal votes were cast, they had not proved that the outcome of the governor's election was changed as a result." *Id.*

Reports of similar voting irregularities have plagued many States in recent years. In 2006, a district court reviewing Indiana's voter identification requirements noted reports of "in-person fraud in recent elections in Florida, Georgia, Missouri, New York, Washington, and Wisconsin," as well as published reports of "individual voters using the names of dead persons . . . in Georgia, Illinois, Maryland, Missouri, Pennsylvania, and Wisconsin." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006). During the 2004 election in Milwaukee, Wisconsin, for example, more than 100 voters either double-voted or voted under a fake name or someone else's name; more than 200 ineligible felons cast votes; and the number of votes counted exceeded the number of recorded voters by

more than 4,500. Preliminary Findings of Joint Task Force Investigating Possible Election Fraud 2-3 (May 10, 2005), available at www.wispolitics.com/1006/electionfraud.pdf (last visited Mar. 31, 2010).

Election-related fraud is not limited to voter fraud. In fact, petition fraud has become increasingly common in recent elections. This Court's observation, more than two decades ago, that the risk of election fraud is "more remote at the petition stage . . . than at the time of balloting," *Meyer*, 486 U.S. at 427, has not borne out. In the years since *Meyer*, "[g]athering signatures has increasingly become a business, and like any other business it is run for profit." Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 Mont. L. Rev. 35, 37 (2003). This is not just a general trend: In Washington specifically, there was a "rapid transformation . . . from volunteer to professional signature gatherers" in the 1990s. *Id.* at 56. In conjunction with this shift, scholars now conclude that there may be as much, if not more, corruption in initiative campaigns than representative elections. See K.K. DuVivier, *Perspectives: Ballot Initiatives and Referenda: Out of the Bottle: The Genie of Direct Democracy*, 70 Alb. L. Rev. 1045, 1048 (2007); see also *id.* at 1048 n.15 (citing other commentators).

For example, in 2006, opponents to three Montana initiatives challenged more than 64,000 petition signatures collected by nonresident petition circulators. The circulators used false addresses and "bait and switch" tactics to collect signatures. See *Montanans for Justice v. State*, 146 P.3d 759, 776 (Mont. 2006). Based on voter testimony about the

circulators' conduct, and the proponents' failure to present a single circulator who could rebut or limit the allegations, the Montana Supreme Court invalidated all of the challenged signatures. *Id.*

That same year, the Oklahoma Supreme Court struck an initiative petition supporting a constitutional amendment known as the Taxpayer Bill of Rights. See *In re Initiative Petition No. 379*, 155 P.3d 32, 34 (Ok. 2006). The Court found that circulators engaged in "a pervasive pattern of wrongdoing and fraud" in the signature collection process. *Id.* The circulators "committed much more than mere technical violations of Oklahoma law—they attempted to destroy the safeguards by which signatures are obtained and verified." *Id.* at 50.

Also in 2006, the Michigan Civil Rights Commission investigated numerous allegations of fraud involving the Michigan Civil Rights Initiative ("MCRI"). A federal district court concluded that "[t]he evidence overwhelmingly favor[ed] a finding that the MCRI defendants engaged in voter fraud." *Operation King's Dream v. Connerly*, No. 06-12773, 2006 U.S. Dist. Lexis 61323, at *33 (E.D. Mich. Aug. 29, 2006). Circulators had "objectively misrepresented the purpose of the petition." *Id.*; see Report of the Michigan Civil Rights Commission Regarding the Use of Fraud and Deception in the Collection of Signatures for the Michigan Civil Rights Initiative Ballot Petition (June 7, 2006), available at www.michigan.gov/documents/Petition Fraudreport_162009_7.pdf (last visited Mar. 31, 2010).

Petition fraud similarly marred independent candidate Ralph Nader's efforts to appear on the

2004 presidential election ballot. Ohio discovered that Nader's supporters submitted a large number of invalid and fraudulent signatures in an attempt to place Nader's name on the ballot in 2004. See *Nader v. Blackwell*, 545 F.3d 459, 462 (6th Cir. 2008). An independent candidate in Ohio must submit a nominating petition with 5,000 voter signatures to be placed on a general election ballot. Ohio Rev. Code Ann. § 3513.257(A). Local election boards invalidated nearly 8,000 of the 14,773 signatures on Nader's petition, and—exercising their right to publicly access the petitions—protesters challenged many of the remaining signatures. *Nader*, 545 F.3d at 462. The Secretary of State ordered an administrative hearing, which led to the invalidation of an additional 2,756 signatures based on detailed evidence of election fraud and forgery. *Id.* at 467. Nader was removed from the ballot.

Nader faced similar problems in Arizona, where voters filed suit alleging that Nader's nomination petitions "did not provide the required number of valid signatures, that the petitions included signatures forged by circulators, that some petitions had been circulated by felons, and that the petitions contained falsified addresses of circulators." *Nader v. Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008) (describing Nader's 2004 election efforts in the context of Nader's subsequent challenge to Arizona's nomination-petition system). "Nader conceded that the petitions did not meet the signature requirements and . . . withdrew his candidacy for the Arizona ballot." *Id.*

The States have a compelling interest in preventing both petition fraud specifically and

election fraud more generally. The above evidence demonstrates that the risk of fraud is real. And Washington need not prove that petition fraud has occurred within its borders to justify regulating the petition process. This Court recently upheld an Indiana law intended to prevent election fraud even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 128 S. Ct. at 1619. In spite of that silence, the Court recognized Indiana's interest in combating a "real" "risk of voter fraud" in light of the "flagrant examples of such fraud in other parts of the country," "occasional examples . . . in recent years," and the State's experience with other kinds of voting fraud. *Id.* Like Indiana, Washington here has a "compelling interest in preventing . . . fraud" in its petition process. *Purcell*, 549 U.S. at 4.

"While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 128 S. Ct. at 1619. Washington's decision to make petition signatures public records combats fraud by allowing for public oversight of the petition process. And "[t]here is no question about the legitimacy or importance of the State's interest in counting only the [signatures] of eligible voters" *and* allowing the public an opportunity to ensure the State's accuracy. *Id.*; see *infra*, Part C.3 (discussing the State's compelling interest in open government).

2. States have a compelling interest in preserving the integrity of elections.

Washington also "indisputably has a compelling interest in preserving the integrity of its

election process." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); see also *Crawford*, 128 S. Ct. at 1617 (confirming the States' interest in "protecting the integrity and reliability of the electoral process"); *Timmons*, 520 U.S. at 364 (describing the States' interest in "protecting the integrity, fairness, and efficiency of their ballots and election processes."); *First Nat'l Bank*, 435 U.S. at 788-89 (observing that state regulatory interests, including "[p]reserving the integrity of the electoral process . . . are interests of the highest importance"). Though "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 128 S. Ct. at 1620 (internal quotation omitted).

Efforts to preserve ballot integrity encompass not only the prevention of actual fraud, but also perceptions of fraud. "An electorate that perceives fraud as an endemic presence in the electoral system—based on either their own experiences or the prevalence of allegations elsewhere—is likely to lose faith in the accuracy of an election's results, regardless of the fraud's actual effect on the outcome of the election." Benson, *supra* p. 20, at 912; see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 942 (2005) (mere allegations of fraud "adversely affect[] Americans' views of the electoral process"). As the Court has recognized, a State cannot ensure that its "electoral system . . . inspire[s] public confidence if no safeguards exist to deter or detect fraud or to confirm

the identity of voters." *Crawford*, 128 S. Ct. at 1620 (internal quotation omitted). In fact, this is the precise reason the Court allows greater flexibility when reviewing election regulations: "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick*, 504 U.S. at 433 (citing *Storer*, 415 U.S. at 730).

Washington's designation of referendum petitions as public records furthers the State's important interest in protecting the integrity of its ballot by helping to ensure that any ballot issues have the support mandated by state law. See *Anderson*, 460 U.S. at 788 n.9 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot."). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley II*, 525 U.S. at 191. In the end, Washington's requirements for exercising the right of referendum are meaningless if the State cannot verify that a petition qualifies for the ballot—and public access to petitions is an essential tool for verifying that a petition is qualified.

Because ballot integrity hinges on public perception, Washington's interest in preserving the integrity of its elections necessarily encompasses an interest in making information about the electoral process publicly available. Thus, Washington's interest necessitates giving the very citizens who are exercising their sovereign legislative authority

through the referendum process an opportunity to verify the integrity of that process. Public access to referendum petitions is as important to protecting ballot integrity as it is to preventing actual fraud.

3. States have a compelling interest in promoting open government.

Finally, Washington has a compelling interest in furthering the democratic ideal of open government. This country has long cherished the principles of open government as essential to preserving democracy. Stated simply, "[d]emocracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2003). The Framers of the First Amendment sought to "protect[] the people against secret government" because "[w]hen government begins closing doors, it selectively controls information rightfully belonging to the people." *Id.* (internal quotations and citations omitted). "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Public access to information helps "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.*

Not only does democracy value an informed public for its own sake, but a State's interest in open government is bolstered by the fact that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); see *Buckley v. Valeo*, 424 U.S. 1, 83 (1976) ("[D]isclosure serves information functions, as well as the prevention of corruption and

the enforcement of . . . contribution limitations"). An informed public "'alone can . . . protect the values of democratic government.'" *Detroit Free Press*, 303 F.3d at 683 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (per curiam) (Stewart, J., concurring)). When information is readily available, the people are able to "ensure[] that government does its job properly; that it does not make mistakes." *Id.* at 704; see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 491-95 (1985) (arguing that abuse of governmental power "can be warded off by a strict insistence, as a matter of constitutional doctrine, that traditional standards of openness in government be maintained").

Giving the public access to information provides a check on both intentional and inadvertent mistakes by governmental bodies. One clear example is Nader's 2004 nominating petition in Ohio. See, *supra* pp. 23-24. As explained above, after Ohio's Secretary of State determined that only 6,464 of the 14,473 signatures on Nader's petition were valid, protesters contested a large number of the remaining signatures. Only after protesters raised this subsequent challenge did a hearing officer for the Secretary of State invalidate an additional 2,756 signatures for election fraud and forgery. If Ohio had not made the petition signatures publicly available, nearly 3,000 fraudulent signatures would have been counted toward Nader's petition, and Nader would improperly have been included as a candidate on the ballot.

Similarly, Montana's laws allowing citizens to challenge petition signatures, Mont. Code Ann. § 13-

27-301, withdraw them, *id.* § 13-27-306, and contest ballot issues, *id.* § 13-27-317, are all premised on public access to petition signatures. As explained above, see *supra* p. 22-23, this public access aided both challengers and the district court in evaluating allegations of petition fraud in 2006. The district court's findings of fact explain how individual petition signers relied on such access to verify whether or not they had fallen prey to bait-and-switch tactics and to remove their signatures from petitions they did not intend to sign. *Montanans for Justice v. State*, No. CDV 06-1162, Findings of Fact and Conclusions of Law, 12-15 (Sept. 13, 2006). Further, the district court relied on the public availability of the petitions to determine a pattern of likely bait-and-switch tactics by looking for areas where significantly more voters signed all three initiative petitions. *Id.* at 15.

Every State has recognized its compelling interest in open government—both as a check on government power, and as a means of informing the public—by enacting public records acts and open meeting laws. See State Sunshine Laws, *supra* p.1; State Open Meetings Laws, *supra* p.1. These laws are "justified without reference to the content of the regulated speech," *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), and impose only "reasonable restrictions on the time, place, or manner" of speech, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). These laws do not compel speech; instead, they grant public access to certain speech relevant to government processes and decisions. And they only minimally burden the speech of public officials because they leave open

ample alternative channels for communication. See *id.* at 802.

Texas recently defended the constitutionality of the Texas Open Meetings Act ("TOMA") in *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (en banc), and—because the Fifth Circuit dismissed that case as moot rather than resolving the merits of the challenge—is now doing so again in *City of Alpine v. Abbott*, No. 4:09-cv-00059-RAJ (W.D. Texas) (pending). TOMA, like all open meetings laws, requires designated governmental bodies to conduct certain meetings in the open (with advance public notice), at least where a quorum is present, and the discussion involves a public issue within the jurisdiction. As Texas has persuasively argued, requiring public officials to conduct public business in public furthers fundamental First Amendment values. See Appellees Supp. Br., *Rangra v. Brown*, No. 06-51587 (5th Cir. Aug. 28, 2009), at 33-39. Further, open meetings laws satisfy traditional First Amendment analysis under *Ward* because they are justified without reference to the content of the regulated speech and they are narrowly tailored to serve the States' significant interest in open government. See *id.* at 39-53; see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010); *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (upholding Colorado open meetings law as a reasonable time, place, and manner restriction); *Difanis v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980) (upholding Illinois open meetings law).

Like open meetings laws, public records acts fulfill the First Amendment's goal of "affording the public access to discussion, debate, and the

dissemination of information and ideas." *First Nat'l Bank*, 435 U.S. at 783. Indeed, courts have repeatedly invoked the First Amendment itself to require public access to and openness in a variety of government proceedings. *See, e.g., Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co.*, 457 U.S. 596; *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980). In fact, the Court recently rejected an as applied challenge to disclosure and disclaimer requirements for election advertising, explaining that "the informational interest alone is sufficient to justify" their application to corporate advertising. *Citizens United*, 130 S. Ct. at 915-16.

The PRA's preamble echoes these interests in open government: "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030. In addition, the Washington legislature also contemplated public access to the specific information at issue—petition signatures—by giving the people a statutory right to challenge the Secretary of State's verification process. *Id.* § 29A.72.240. Without access to petitions, there would be no way for the people to exercise this right. Functioning together, the PRA and Washington's election regulations promote the State's interest in open government because they both ensure that Washington citizens are informed participants, and serve as a check on State officials.

D. Washington's disclosure of referendum petitions under the PRA withstands First Amendment review, regardless of the test applied.

Washington's designation of referendum petitions as public records is consistent with the First Amendment. Because the PRA's application to petition signatures imposes minimal, if any, burdens on petition signers, and is narrowly tailored to serve a compelling government interest, it can easily withstand either the flexible *Burdick* balancing test or more exacting strict scrutiny. Although "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," *Timmons*, 520 U.S. at 359, a regulation that would survive strict scrutiny, as here, necessarily survives *Burdick* review as well.

Because Washington's designation of referendum petitions as public records imposes minimal, if any, burdens on protected speech, the State's important regulatory interests in preventing fraud, preserving ballot integrity, and promoting open government are sufficient to satisfy *Burdick* review. *Burdick*, 504 U.S. at 434. Standing alone, any of these three compelling interests is sufficient to outweigh any burden imposed on petition signers. "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Crawford*, 128 S. Ct. at 1626-27 (Scalia, J., concurring). Here, the Washington legislature decided that its compelling interests outweighed any

potential burdens caused by disclosing petition signatures. And the Court must defer to that judgment because the regulation does not "impose[] a severe and unjustified overall burden" and is not "intended to disadvantage a particular class." *Id.*

Moreover, because the regulation is narrowly tailored to advance a compelling state interest, it would survive even strict scrutiny. Washington's designation of referendum petitions as public records is narrowly tailored to serve each of its three compelling interests because this is the "only means for Washington citizens (1) to independently evaluate and challenge the Secretary's decision whether to certify a referendum to the ballot, and (2) to independently determine whether election laws are being properly enforced." Reply Br. of Appellants at 17-18, *Doe #1 v. Reed*, No. 09-35818 (9th Cir. Sept. 28, 2009). These interests would not be served by a regulatory scheme that relied solely on the government to police itself; therefore, a "less restrictive alternative" is not "readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

Regardless of how the Court characterizes the burden imposed, Petitioners' First Amendment challenge fails.

CONCLUSION

For the above reasons, the Court should affirm the Ninth Circuit's decision.

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AMICUS CURIAE BRIEF

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JOHN DOE # 1, et al.,

Petitioners,

v.

SAM REED, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, ProtectMarriage.com – Yes on 8, A Project of California Renewal (hereinafter "ProtectMarriage.com"), is a "primarily formed" ballot committee under California law. *See* CAL. GOV. CODE § 82047.5. A group of California citizens formed ProtectMarriage.com in order (i) to collect petition signatures in an effort to place what became known as "Proposition 8" on the November 2008 state ballot, and (ii) to campaign in support of Proposition 8 once it was on the ballot. Like Petitioners, Amicus engaged in a hotly contested political campaign to preserve the traditional definition of marriage in state law. As this Court has already noted, many of Amicus' supporters faced harassment, economic reprisal, vandalism, threats, and even physical violence. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010); *Citizens United v. FEC*, No. 08-205, slip op. at 54-55 (Jan. 21, 2010). In many instances, these citizens' support for, or affiliation with, Amicus was publicly disclosed only by operation of state law. Thus, like Petitioners, Amicus and its supporters have a paramount interest in seeing the cherished First Amendment rights to anonymous and/or private political speech, activity, and associations vindicated by this Court in the face

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[1] Pursuant to Rule 37.6, Amicus affirms that no person other than Amicus or its counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part. The parties' letters consenting to the filing of this brief are being concurrently filed with the Clerk.

of a powerful and spiraling trend towards eradication of those rights.

SUMMARY OF ARGUMENT

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982). This protection has roots in our most cherished traditions, as anonymous political speech and private political association were fundamental features of the Framers' political life and the campaign to ratify the Constitution. Accordingly, this Court has repeatedly invalidated government attempts to compel disclosure of the identity of anonymous political speakers, the identity of a political association's members, and the otherwise undisclosed political activities and beliefs of a citizen or association of citizens. These rights have their most urgent application during elections, particularly referendum elections, when a citizen's fundamental right to petition the government for political change is most directly in play.

This Court has always treated compelled political disclosure as constitutionally suspect, subjecting it to heightened scrutiny and approving it only where a compelling state interest justifies the inevitable chill associated with forced speech. In recent years, rapidly changing Internet technology has rendered such compelled disclosure much more

public, comprehensive, pervasive, and chilling. The facts of this case, and the history of Proposition 8 in California, attest to this reality.

In Washington, if a group of citizens disapproves of an enacted law, it may associate, in private and anonymously, to plan a campaign in support of a referendum to block the measure. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958). Those who circulate and solicit signatures for the petition for the referendum have a right to do so anonymously. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999) (hereinafter *"Buckley II"*). And those who ultimately vote for the measure, once it is on the ballot, may do so under the long-established protection of the secret ballot. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995); RCW § 29A.04.206(2) (guaranteeing "[t]he right of absolute secrecy of the vote"). But under Washington's Public Records Act ("PRA"), RCW § 42.56.001 et seq., those who sign the petition to place the measure on the ballot must disclose their name, address, and political beliefs to the world. This forced public disclosure of identity and political belief, justified by no compelling state interest, violates the First Amendment.

Amicus' experiences during and after the Proposition 8 election in California bring into sharp focus the importance of the First Amendment's protection of citizens from compelled disclosure of political association and beliefs. Like Petitioners, Amicus and its supporters backed a politically controversial ballot measure relating to the definition of marriage.

By operation of state law, the names, contact information, and employer information of many of Amicus' donors were publicly disclosed. This led to vast Internet dissemination of these citizens' personal information, which in turn led to widespread harassment, retaliation, threats, and outright violence. Passage of Proposition 8 only served to increase the reprisals and harassment directed against those citizens whose support of the measure was thrust into the public spotlight by operation of state law. Amicus' experience thus shows that it is essential for this Court to once again declare that the First Amendment rights to free political speech and association protect the privacy and anonymity that for some citizens are a precondition to their full and free participation in the political process.

ARGUMENT

I. Compelled Public Disclosure of an Individual Citizen's Support for Placing a Referendum Measure on the Ballot Violates the First Amendment.

The value of anonymous speech and private association was well understood and deeply cherished by the Framers, who, for instance, maintained the confidentiality of the proceedings of the Constitutional Convention for a generation, *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974), and who, by joining issue through nom de plumes such as Publius and the Federal Farmer, conducted in anonymity the

most significant referendum debate this country has ever known, *see, e.g.*, *McIntyre*, 514 U.S. at 343 n.6.[2] In light of this history, this Court has repeatedly recognized, in many different contexts, that the First Amendment prohibits compelled disclosure of a speaker's identity or a citizen's political beliefs, activities, and associations. *See NAACP*, 357 U.S. at 462-63 (recognizing that "the vital relationship between freedom to associate and privacy in one's associations" bars compelled disclosure of group's membership list); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *Talley v. California*, 362 U.S. 60 (1960) (invalidating city ordinance requiring disclosure of handbill author's identity); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 544 (1963) (state cannot compel membership list disclosure because "the guarantee [of free association] encompasses protection of privacy of association in organizations"); *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 828

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[2] *See also id.* at 360-69 (Thomas, J., concurring in judgment); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 n.17 (D.C. Cir. 1981) ("It bears remembering that Elbridge Gerry, Oliver Ellsworth, Roger Sherman, Spencer Roane, Noah Webster, James Iredell, and others all sought anonymity while they conducted the most important political campaign of their lives, the campaign to ratify the federal constitution."); *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . It is plain that anonymity has sometimes been assumed for the most constructive purposes."); *Citizens United*, slip op. at 37. ("At the founding, speech was open . . . [and] there were no limits on the sources of speech and knowledge.").

(1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings"); *Socialist Workers*, 459 U.S. at 100-01 (contribution and expenditure disclosure requirements were unconstitutional as applied to minor political party); *Dawson v. Delaware*, 503 U.S. 159 (1992) (introduction of criminal defendant's political association at penalty phase of trial violated First Amendment associational rights); *McIntyre*, 514 U.S. at 343 (embracing a "respected tradition of anonymity in the advocacy of political causes" in striking down law requiring identification of author of political handbills); *Buckley II*, 525 U.S. at 199 (striking down state law requiring petition circulator to disclose identity by wearing name badge); *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down "requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection" because it results in a "surrender of that anonymity").[3]

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[3] Likewise, the long line of cases affirming the First Amendment right not to speak are animated by the principle that it is not for the government to tell its citizens what to say, when to say it, or when and how to publicly embrace political speech, activities, or association. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of

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The First Amendment protects anonymous speech and privacy in political activity and association for several reasons. Most importantly, compelled disclosure of controversial, unpopular speech and political activity will often lead to harassment and reprisal, which in turn chills and diminishes such speech and activity. *See NAACP*, 357 U.S. at 462-63; *DeGregory*, 383 U.S. at 828-29; *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) ("*Buckley I*"). This case falls in that bucket, based both on the expressed intentions of some of those who seek public disclosure of names in Washington, *see Doe v. Reed*, 661 F. Supp. 2d 1194, 1199 (W.D. Wash. 2009), and the recent history of the fallout from similar disclosures in California, *Hollingsworth*, 130 S. Ct. at 707 (noting that supporters of Proposition 8 have been subject to "death threats," "physical violence," "vandalism," verbal harassment, economic retaliation, and blacklisting through Internet dissemination of identity); *NAACP*,

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the principle of free speech is that one who chooses to speak may also decide 'what not to say.' ") (citation omitted); *PG&E Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 9 (1986) (conditioning speech on publication of unwanted additional speech unconstitutionally "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[A]ny such a compulsion to publish that which reason tells them should not be published is unconstitutional.") (quotation marks omitted); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment . . . includes . . . the right to refrain from speaking at all."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

357 U.S. at 462-63 (First Amendment bars disclosure upon "showing that on past occasions revelation of the identity of [association's] rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility").

But curtailment of harassment and reprisal is not the only reason for the First Amendment's solicitude for anonymity and privacy. Instead, the First Amendment recognizes and protects the myriad reasons a person may have for including or excluding particular information – including identity, associational bonds, or beliefs – from public political expression. *See* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 J. OF CONST. L. 1, 16-20 (2003). For example, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *McIntyre*, 514 U.S. at 342. *See also McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Kennedy, J., concurring in judgment and dissenting in part) ("The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views . . . ."). Or a citizen might seek to avoid "decontextualized judgments" derived from disclosure of only "fragmentary information" regarding that person's political views. McGeveran, *supra*, at 19. Or citizens may seek to insulate themselves from the potential post-election consequences of backing the wrong horse. *See Buckley I*, 424 U.S. at

237 (Burger, C.J., concurring in part and dissenting in part) ("[P]otential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent."); McGeveran, *supra*, at 16. Or citizens involved in an election campaign may prefer not to share their campaign strategy with their opponents, before, during, or after the election. *See McConnell*, 540 U.S. at 363 (Rehnquist, C.J., dissenting) (recognizing interest in keeping "political strategy" private); *id.* at 321 (Kennedy, J., concurring in judgment and dissenting in part) (same). Or citizens may object to the notion that their speech or association should be examined or cleared by the government. *See Watchtower*, 536 U.S. at 167 ("There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate . . ., that they would prefer silence to speech licensed by a petty official."); *Buckley II*, 525 U.S. at 198 n.19 (crediting evidence of petition circulator who simply did not "think it's right" to have to wear an identification badge). Or a citizen may simply – and quite understandably in an age of ever-increasing incursions on the privacy of personal information – "be motivated by . . . a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. In sum, citizens may choose to keep their political voices anonymous, and their political associations and activities private, for any number of reasons or no reason – and that is a choice that the First Amendment protects.

Despite these deep historical and constitutional roots, statutory and regulatory law in the last few decades has required ever-increasing public disclosures of political speech, belief, and associational activities that would otherwise remain largely anonymous and confidential. *See Buckley I*, 424 U.S. at 61-63 (describing history of federal campaign disclosure laws); McGeveran, *supra*, at 9 n.38. This Court has upheld such compelled disclosure requirements only in certain delimited circumstances, where the government has employed a measure narrowly tailored to advance a compelling interest. *See Buckley I*, 424 U.S. at 64-68 (finding that federal laws requiring disclosure of campaign contributions to candidates meet "exacting scrutiny" because government interests served were "sufficiently important"); *McConnell v. FEC*, 540 U.S. at 96 ("important interests" identified in *Buckley I* justify BCRA's disclosure requirements); *Citizens United*, slip op. at 51-55 (upholding, under "exacting scrutiny," disclosure requirement for "corporate independent expenditures" on candidate ads because of public and shareholder need to hold corporations and supported candidates accountable).

This case thus comes at the crossroads of two trends in American law. Behind one trend lies a venerable tradition of the right to anonymous and private participation in the political process that was a cherished practice of the Founders themselves. Behind the other trend lies modern regulatory attempts to compel disclosure of political beliefs and activity – attempts that have often, but not uniformly,

been found unconstitutional. Here, the immediate question is whether the State of Washington has advanced an interest so compelling that the State is justified in forcing its citizens to disclose publicly their political opinion and affiliation with respect to placing issues on the ballot. If the core First Amendment freedoms to speak, to associate, and to petition are to remain robust, the answer must be no.

A. Under the First Amendment, Citizens Cannot Be Compelled to Publicly Disclose Their Support for Inclusion of a Referendum Question on a Ballot.

As this Court has repeatedly recognized, political speech and association[4] during the course of a referendum campaign lie at the very core of the First Amendment's protection. *See McIntyre*, 514 U.S. at 347; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (speech during referendum campaign "is at the

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[4] Political activism is often most effective when coordinated with, and buttressed by, like-minded associates. This is why the First Amendment protects assembly as well as speech. *See, e.g.*, *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process"); *NAACP*, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."); *Citizens United*, slip op. at 1 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.").

heart of the First Amendment's protection" and "indispensable to decisionmaking in a democracy"); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("the circulation of a petition involves the type of interactive communication concerning political change that is . . . 'core political speech'"). And because privacy in association and anonymity in speech are often indispensible to effective exercise of the right, *NAACP*, 357 U.S. at 460-62, this Court has explicitly held that anonymity and privacy, if desired, are protected during nearly every aspect of a referendum campaign and election.

In *Buckley II*, this Court held that a petition circulator cannot be compelled to wear an identification badge while circulating a petition; because the "endeavor to persuade electors . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change," the circulator has a right of anonymity. 525 U.S. at 199. *See also Watchtower*, 536 U.S. at 166 (state cannot compel door-to-door solicitors to reveal identity). Under *NAACP*, 357 U.S. at 462-63, and *DeGregory*, 383 U.S. at 828-29, citizens have the right to associate in private to discuss a proposed referendum and plan a campaign for or against it.[5] In *McIntyre*,

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[5] Legislators, too, are shielded from disclosure of internal and confidential political activity, speech, and deliberation. *See, e.g.*, CAL. GOV. CODE § 6254 (exempting from California Public Records Act disclosure some "[p]reliminary drafts, notes, or interagency or intra-agency memoranda"); RCW § 42.56.280 (exempting from Washington PRA disclosure "[p]reliminary

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this Court held that a person opposing a referendum measure already on the ballot cannot be compelled to include her identity – or any other content – on her homemade campaign handbill. 514 U.S. at 342-49 ("the identity of the speaker is no different from other components of [a] document's content that [an] author is free to include or exclude") (citing *Tornillo*, 418 U.S. 241). And, as this Court has recognized, when voters go to the polls to make their final decision on a ballot measure, they enjoy "the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *McIntyre*, 514 U.S. at 343. *See also Rogers v. Lodge*, 458 U.S. 613, 647 n.30 (1982) (Stevens, J., dissenting) ("[T]he very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast."); *Buckley v. Valeo*, 519 F.2d 821, 867 n.117 (D.C. Cir. 1975) ("In this country a person's right to vote secretly is inviolate."), *aff'd in part and rev'd in part on other grounds*, 424 U.S. 1 (1976); *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (barring judicial inquiry that "would entail an intolerable invasion of the privacy that must

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drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated"); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297-99 (9th Cir. 1984) (barring as a "hazardous task" deposition of state legislators to determine their motive in enacting a law). *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 48-54 (1998) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)) (absolute immunity for state legislators from "judicial interference" in federal civil suits).

protect an exercise of the franchise"); *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("the policies underlying the 'secret ballot' prevent courts from inquiring into the votes of the electorate").[6]

There is, then, only one link missing from this chain: the protection of the anonymity and privacy of those persons who sign the petitions to place a referendum on the ballot. It follows ineluctably from the above authorities that this core expressive and associative activity – this petitioning of the government – likewise falls within the First Amendment's embrace of anonymous political speech and private assembly. Indeed, in *Buckley II*, the Court explained that a petition circulator's "endeavor . . . of necessity involves both the expression of a desire for political

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[6] This Court has not squarely addressed the constitutionality of compelled disclosure of individual monetary contributions and expenditures by political associations made during ballot-measure campaigns. The Ninth Circuit has upheld such disclosure laws in California, but recognized that such disclosure "unquestionably infringes upon the exercise of First Amendment rights," and thus must be "justified by a compelling state interest." *California Pro-Life Council, Inc. v. Getmen*, 328 F.3d 1088, 1101 (9th Cir. 2003) (quotation marks omitted). That court held that the informational interest in helping voters evaluate millions of dollars worth of campaign advertising and spending justified the encroachment on this core political speech. As explained below, there is no similar informational interest here, where the political speaker is an individual citizen who is simply expressing a preference to put a specific measure on the ballot, the text of which speaks for itself and is indifferent to the identity of the individual citizens who support its inclusion on the ballot.

change and a discussion of the merits of the proposed change." 525 U.S. at 199 (quotation marks omitted). This discussion about political change involves, necessarily, two people – circulator and signer, solicitor and solicited. There is no principled reason why the First Amendment would protect the former's identity from compelled disclosure but not the latter's.[7]

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[7] In *Buckley II*, the Tenth Circuit upheld a state law that required petition circulators to submit completed petitions with an affidavit that included the circulator's name and address and a statement that the circulator "has read and understands the laws governing the circulation of petitions." 525 U.S. at 188-89, 191. This Court did not have the affidavit requirement before it, *id.* at 186, but did note that such a regulation was "the type of regulation for which *McIntyre* left room," *id.* at 200. But the Tenth Circuit upheld that requirement because "[a] state has a strong, often compelling, interest in preserving the integrity of its electoral system" and petition circulators are "entrusted with personal responsibility to prevent irregularities in the petition process." *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1099-1100 (10th Cir. 1997). The affidavit requirement served that interest because it "ensure[d] that circulators . . . exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures." *Id.* (quotation marks omitted). Also, in explaining why the affidavit requirement was permissible but the badge requirement was not, the Tenth Circuit noted that "an identification badge is much more accessible than information attached to a filed petition." *Id.* at 1102. Neither rationale can be said to support public identification of *individual* petition signers in this case. First, unlike a petition circulator, a single voter does not have broad responsibility to ensure that all signatures are gathered without mistake, fraud, or abuse – so the compelling state interest is absent. Second, the record of accessibility of the affidavit was undeveloped in the 1997 Tenth Circuit case, *see id.* at 1099. In this case – in 2010, when information accessibility and

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The State has advanced the theory that petition signers in Washington waived their First Amendment rights (i) by signing in public, (ii) by signing forms that allowed subsequent signers to view their information, and (iii) because others who know of their signing are not prohibited from publicizing the information. Secretary of State Sam Reed's Br. in Opp. to Pet. for Cert. (hereinafter "Secretary's Cert. Opp.") at 17-21. In *Watchtower*, the Court rejected this very argument, holding that physical revelation of identity to individuals when canvassing does not mean "anonymity interests" are voided, for the canvasser still maintains anonymity with respect to those he or she does not know or recognize personally. 536 U.S. at 166-67. Indeed, in *McIntyre*, Ms. McIntyre personally distributed her unsigned leaflet at a local community gathering where she was personally known to some of the participants, yet that fact did not destroy her First Amendment right to omit her name from her leaflet. *See* 514 U.S. at 337-38.

Likewise, the fact that the petition form has space for multiple signatures does not mean that a signer thereby cedes all interests in anonymity. As

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dissemination are nearly boundless – the record is clear that filing of petition signatures will result in immediate mass publication, available to anyone with an Internet connection, for the express purpose of prompting "uncomfortable" confrontations, or worse. *See Doe v. Reed*, 661 F. Supp. 2d at 1199. The closely analogous situation in California attests to the same fact. *See Citizens United*, slip op. at 2-3 (Thomas, J., concurring in part and dissenting in part).

the Eighth Circuit has explained under similar circumstances, petition signers "d[o] not waive their privacy interests" merely because subsequent signers might see their names. *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). "The present concern is that the petition not become available to the general public. . . . This type of privacy interest[,] one in which individuals seek to keep information from the general public while simultaneously divulging it for limited purposes to others[,] is not unusual." *Id.*

Signing a petition in support of placing a measure on the ballot is an act of political expression. As with other political acts – like leafleting, soliciting petition signatures, or voting – a citizen is entitled to choose the means by which he or she publicizes that political expression, including means tailored to protect as much of that citizen's privacy and anonymity as possible. Thus, the State may intrude on that right, and force broad public disclosure of speech and association a citizen would otherwise keep private, only upon a showing of a compelling need.

B. The State Has No Interest Sufficient to Justify Its Abrogation of First Amendment Rights.

"The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State [that is] compelling, and then only if there is a substantial relation between the

information sought and [an] overriding and compelling state interest." *Socialist Workers*, 459 U.S. at 91-92 (quotation marks and citation omitted; alterations in original). The State has advanced (and the Ninth Circuit credited) two interests that supposedly justify broad public disclosure of a petition signer's name and address.

First, the State claims that petition signers act in a legislative capacity and the public has a right to know which individual citizens adopt such a role. Secretary's Cert. Opp. at 35; *see also Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). This factually inaccurate argument proves far too much. Placing a question on the ballot effects *no* legislative change; rather, legislative change occurs when citizens vote to pass the ballot measure.[8] Thus, if the State has an interest "in knowing who has taken such action," *Doe*, 586 F.3d at 680, it has a much greater interest in abrogating "the secret ballot, the hard-won right to vote one's conscience without fear of retaliation," *McIntyre*, 514 U.S. at 343. Yet the State explicitly protects the secrecy of the ballot. *See* RCW § 29A.04.206(2). Moreover, the public purpose of the expressive act embodied in an individual citizen's appeal to the entire electorate for political change "'does not depend upon the identity of its source.'" *Citizens United*, slip op. at 33 (quoting *Bellotti*, 735

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[8] *Cf. Buckley II*, 525 U.S. at 192 n.11 (petition "circulators act on behalf of themselves or the proponents of ballot measures," not as state actors).

U.S. at 777). Indeed, as Justice Stevens has recently noted, "[a] referendum cannot owe a political debt . . . , seek to curry favor, . . . or fear . . . retaliation," *id.* at 53 (Stevens, J., dissenting), and thus it is inconsequential which individual citizens supported its inclusion on the ballot. In any event, even if the identity of petition signers were somehow relevant to voters, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348.

Second, the State claims that public disclosure is necessary to ensure "government transparency and accountability" – that is, to ensure that the Secretary of State has properly evaluated a petition for certification purposes and that State officials are prosecuting those who illegally sign petitions. Secretary's Cert. Opp. at 34. The fact that Washington's referendum system functioned properly for many years without such public disclosure, Petitioners' Br. at 9 n.18, undermines the credibility of this argument. Indeed, in California, where voters resort to direct democracy more frequently than voters in all but one other state,[9] petition signers' privacy is explicitly protected in state law. *See* CAL. ELEC. CODE § 18650. Despite these protections, the Californian

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[9] *See* Initiative and Referendum Institute, Initiative Use (Feb. 2009), at 2, *available at* http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%281904-2008%29.pdf.

experiment in direct democracy continues to have ample transparency and accountability in the petition process.[10] In any event, the State fails to explain how the PRA – a blunderbuss disclosure law not specifically related to elections – is narrowly tailored to meet these asserted interests.

Thus, "[t]he strong associational interest in maintaining the privacy of [supporter] lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the [State]." *Gibson*, 372 U.S. at 555-56.[11]

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[10] Thus, in holding that a petition signer has no interest or right to privacy under the First Amendment, the Ninth Circuit parted ways with the better reasoned decision of the Sixth Circuit in *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981). *Anderson* addressed a Kentucky statute that required a signer of a petition to put a presidential candidate on the ballot to attest that he or she desires to vote for the candidate. *Id.* at 607-08. The Sixth Circuit held that forcing a citizen to "hav[e] his political preference clearly and unmistakably disclosed" had an "obvious" "chilling effect . . . on associational rights." *Id.* at 609. Because the state could not demonstrate a compelling reason for such disclosure – avoiding "confusion, deception and even frustration of the democratic process" was not sufficient, *id.* at 609-10 – the Sixth Circuit found that the statute ran afoul of the First Amendment.

[11] In *Citizens United*, this Court upheld a requirement that corporations must disclose their identity when making large contributions to fund electioneering communications in federal candidate elections. Whatever the merits of such disclosure in that context, disclosure of *individual* voters' political speech and association during a *referendum* campaign presents a very

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II. In California, Public Disclosure of Donor Information Led to Chilling of Speech and Association.

This case began when two groups – Whosigned.org and KnowThyNeighbor.org – requested copies of the Referendum 71 petition so they could "publish the names on the internet of every" signatory and thereby "'encourage individuals to contact' and to have a 'personal and uncomfortable conversation' with any person who signed the petition." *Doe*, 661 F. Supp. 2d at 1199. This and similar efforts have not been

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different calculus: the state's interest in disclosure is far less weighty and the potential chill is far greater. *See, e.g.*, *Citizens United*, slip op. at 53 (Stevens, J., dissenting) (listing cases recognizing "candidate/issue" distinction in justifying speech regulations); *Citizens Against Rent Control*, 454 U.S. at 299; *Buckley II*, 525 U.S. at 203 (citing *Meyer*, 486 U.S. at 427-28 (citing *Bellotti*, 435 U.S. at 790), *McIntyre*, 514 U.S. at 352 n.15). Signing a petition is more akin to voting than it is to making a large contribution; and even if it were akin to making a contribution, the amount contributed – zero – would not pass the rationality test for contribution disclosure thresholds. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033-34 (9th Cir. 2009). *Cf. Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (affirming "the existence of some lower bound" at which contribution limits are unconstitutional).

Moreover, in the context of corporate speech, individual citizens can still speak anonymously because their role as a shareholder or stakeholder within the speaking corporation may not be publicly known even if the corporation's identity is publicly disclosed. It would be anomalous and perverse to hold that those citizens who eschew the corporate form are not entitled to the same anonymity and privacy.

confined to Washington. On its website, for example, KnowThyNeighbor.org has published the names of petition signers in four other states.

In California, during the Proposition 8 election campaign, other groups published the names of every contributor to ProtectMarriage.com, along with a map that displayed each donor's name, profession, and address. *See* http://www.californiansagainsthate.com; http://www.eightmaps.com. In the wake of these broad public disclosures, supporters of Proposition 8 were subjected to economic reprisal, loss of employment, blacklisting, verbal abuse, racial and religious scapegoating, vandalism, threats of physical violence, actual physical violence, death threats, and other manifestations of public and private hostility. *See, e.g.*, Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009), *available at* http://www.heritage.org/Research/Family/upload/bg_2328-3.pdf. In light of these realities, this Court has already twice this Term taken note of the chilling effect public disclosure has had on participation in the debate over the definition of marriage in California. *See Hollingsworth*, 130 S. Ct. at 707, 713; *Citizens United*, slip op. at 54 (citing these examples as "cause for concern"). *See also id.* (Thomas, J., concurring in part and dissenting in part). *Compare Buckley II*, 525 U.S. at 198 (crediting evidence that identity disclosure lessened number of persons willing to work publicly for a petition drive because of fear of "recrimination and retaliation that

bearers of petitions on 'volatile' issues sometimes encounter").[12]

As these examples demonstrate, the chilling effect of compelled disclosure of political association and beliefs identified in *NAACP*, *Buckley II*, and a host of other cases has grown ever more frigid as technology has allowed such information to spread more quickly, widely, and permanently. *See* McGeveran, *supra*, at 11-13 (explaining how "change in technology qualitatively transformed the nature of disclosure laws"). *Cf. Citizens United*, slip op. at 48-49 (recognizing that "[o]ur Nation's speech dynamic is changing" and that "[r]apid changes in technology . . . counsel against upholding a law that restricts political speech . . . by certain speakers").

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The Founders, who kept the notes of their Constitutional Convention secret and who "sought anonymity while they conducted the most important political campaign of their lives," *Machinists Non-Partisan Political League*, 655 F.2d at 388 n.17, would recoil from the disclosures compelled by modern election laws. Because "political speech must prevail against laws that would suppress it," *Citizens United*,

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[12] Once Proposition 8 passed, instances of retaliation and harassment only intensified, *see, e.g.*, Messner, *supra*, at 7-8, 12-13, further ensuring that Californians may hesitate to participate in future controversial ballot initiative campaigns, *see* Petitioners' Br. at 6 & n.13.

slip op. at 23, the First Amendment's deeply rooted protection of anonymous speech and private political association shields citizens from the type of harassment suffered by Proposition 8 supporters in California.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the PRA's compelled disclosure of ballot petition signatures should be held unconstitutional.

Respectfully submitted,

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AMICUS CURIAE BRIEF

09-559

~~No. 08-994~~

IN THE

Supreme Court of the United States

JOHN DOE #1, ET AL.,

Petitioners,

v.

SAM REED, SECRETARY OF STATE OF WASHINGTON, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GANNETT CO., INC., NATIONAL NEWSPAPER ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, THE RADIO-TELEVISION DIGITAL NEWS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are six national news media organizations — The Reporters Committee for Freedom of the Press, Gannett Co., Inc., National Newspaper Association, Newspaper Association of America, The Radio-Television Digital News Association, and the Society of Professional Journalists.

This case concerns an issue critical to the media and the public in general: whether referendum petitions are protected speech under the First Amendment and the effect on government accountability and openness laws should referendum petitions become protected under the First Amendment. *Amici* and their members regularly use government openness and accountability laws to effectively report on governmental affairs to the general public. Allowing each and every state open meetings law to be subject to constitutional challenge would severely affect their ability to perform this public function.

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

SUMMARY OF ARGUMENT

To understand this case, one must first recognize the line between private action and state action. When citizens undertake to "petition the government for a redress of grievances," they act in a private capacity and are subject to full First Amendment protection. U.S. CONST. amend I. But when citizens assume the role of a state actor, particularly by following the procedures for governmental action outlined in a state constitution, the First Amendment is not implicated. That amendment divides the free speech interest between two sides —government actors and the governed — and prohibits government action that interferes with the intellectual freedoms of the people. The petitioners here were playing a constitutionally described role and became state actors. Accountability for those actions simply does not implicate the First Amendment.

The line between state action and private action was not given proper attention by either the United States District Court for the Western District of Washington or the United States Court of Appeals for the Ninth Circuit. Both courts assumed that referendum petitions qualify as speech, but this conclusion is erroneous. This Court's first inquiry should not be what level of scrutiny applies here, but whether the First Amendment is implicated at all, given the fact that petitioners in this case are actually state actors.

Citizens who are exercising their referendum power are acting in a governmental capacity; they are no longer speaking as private citizens. *See State v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) (noting

that the referendum is an "exercise of the reserved power of the people to legislate"). This Court and others have previously recognized scenarios where private citizens are actually acting as the state, or where government officials are not entitled to First Amendment protection in carrying out their public responsibilities. Submitting a referendum petition — as opposed to the purely private action to "petition the government for a redress of grievances" in the First Amendment — is analogous to those state actions, and not to private citizens expressing political views. In fact, referendum petitions do not even deserve an intermediate level of scrutiny that is afforded to some types of expressive conduct because there is no need to conduct a balancing test to identify an overriding government interest when the behavior affected is government action itself, not private speech.

Further, referendum petitions should not be treated in the same manner as the secret ballot, because the secret ballot system sprang from a unique historical context that is not present in this case.

It is also inappropriate to claim that there is a constitutional right to privacy in this situation — this Court has only recognized a privacy interest when there is a threat of government interference in an individual's personal, private sphere. Initiating a law through a referendum — a law that will govern all residents of a state — is clearly an action taken in the public sphere, for which there is no constitutional individual privacy right. Finally, while this Court has found that strict scrutiny applies in cases involving petition circulation, this Court reached that conclusion because the laws at issue in those cases were

attempting to regulate interactive communication. Washington's Public Records Act does not restrict petitioners from communicating with others.

Allowing petitioners to prevail on the claim that referendum petition signatures are private would have far-reaching and devastating effects on this country's system of open government and governmental accountability. This country does not permit government to operate in secret, which is exactly what petitioners are asking this court to allow. Citizens have the right to evaluate their government and its actors, and they can only do so if governmental actors are required to *disclose* their actions. If governmental acts are allowed to occur anonymously under the guise of protecting speech, this Court will pave the way for any government acts involving personal expression to trump accountability and openness laws, risking the elimination of open meetings, governmental disclosure requirements, and almost any government accountability law.

ARGUMENT

I. This Court's initial inquiry should be whether petition signing in the referendum context truly qualifies as speech, or whether it is more like state action with no constitutional right to enforce its secrecy.

In claims involving expressive speech or conduct, the first question before the court is always whether the action at issue is speech, or whether the action is actually another type of conduct that does not necessarily implicate the First Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This initial inquiry is critical, as mistakenly classifying certain types of conduct as pure speech has far-reaching, adverse effects. Automatically classifying petition signing as "speech," without examining the context in which it occurs, may lead to the erroneous conclusion that petition signing qualifies as core political speech deserving of strict scrutiny, when in fact, citizens signing a petition should be viewed as state actors engaging in the legislative process. Failing to make this distinction between government action and speech will seriously damage this country's firmly established system of open government and accountability.

A. During a referendum, citizens are engaged first and foremost in the legislative process and are acting in a governmental capacity.

The state constitution of Washington allows citizens to act as legislators, by providing them the power to enact or revoke legislation through initia-

tives and referendums. *Wash. Const. art.* II § 1. Washington is not unique in this aspect; in 27 other states, voters can not only elect their representatives, but may also create and repeal laws through either the initiative and referendum process, or both. Initiative and Referendum Institute, *A Brief History of the Initiative and Referendum Process in the United States,* 2-3 (2008); *see also* http://www.iandrinstitute.org/. The power of self-governance is an important part of Washington history and forms a critical component of the state's government today.

Washington's referendum power has its roots in the Populist and Progressive movements that occurred during the late 1800s to early 1900s, both of which promoted direct democracy and the ability for the people to have more control within the legislature. Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum,* 32 Gonz. L. Rev. 247, 253 (1996-97). In 1911, Washington elected to amend the state constitution to grant its citizens the right to initiatives and referendums. *Id.* at 251-52. These rights are now viewed as analogous to those of the legislature. Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making,* 39 Gonz. L. Rev. 447, 454-55 (2003-04).

The Washington Supreme Court has repeatedly confirmed that state citizens may become legislators through exercising initiative and referendum powers. "A referendum or an initiative measure is an exercise of the reserved power of the people to legislate." *State v. Murphy,* 982 P.2d at 615. In *In re Estate of Thompson,* the court found that the people "wield di-

rect legislative power" when voting to approve an initiative. 103 692 P.2d 807 (Wash. 1984); *see also Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 779 (Wash. 2000) (court noted that the people act with "the same power of sovereignty as the Legislature" when acting in their reserved power to enact a statute); *Washington Federation of State Employees*, 901 P.2d 1028, 1034 (Wash. 1995) (finding [i]n approving initiative measures, the people exercise the same power of sovereignty as the Legislature when it enacts a statute").

Based on the language of the state constitution, the history of the referendum process in Washington, and state jurisprudence on initiatives and referendums, it is clear that citizens involved in the referendum process are no longer acting as private citizens, but rather as legislators and state actors. Petitioners in this case have moved beyond simply expressing their political views about a controversial issue; they are actively attempting to utilize the referendum power to revoke legislation. Petitioners are clearly engaging in a legislative act, which has not been afforded the traditional protections under the First Amendment.

B. Courts have previously distinguished between individuals when they act as private citizens and when they act in a public capacity.

A court does not automatically assume that a citizen is always a private citizen, no matter the circumstances. Courts have carefully drawn the line between private citizens and citizens acting as state agents, and have found that private parties can be

acting in unison with the government to the point where they become agents of the government, or that state agents are not automatically entitled to the same First Amendment rights and protections as a private citizen would be in the same situation.

For example, in *Berger v. Hanlon*, the United States Court of Appeals for the Ninth Circuit found that members of the media who accompanied police officers on searches of private property were state actors for purposes of a civil liability suit.[2] 129 F.3d 505, 514-16 (9th Cir. 1997) (vacated and remanded on other grounds, 526 U.S. 808 (1999)) (court allowed plaintiffs to sue under 42 U.S.C. § 1983 and *Bivens*; liability for private actors under those authorities is only available if the private party's conduct can be fairly attributed to the state). The Ninth Circuit found that courts use several "state actor tests" that were developed to determine whether the "conduct of private parties amounts to government action," including: (1) the governmental nexus test, where courts examine whether there is a sufficiently close nexus between the government and the party so that the action of the party may be fairly treated as that of the state itself; and (2) the public function test which states that state action is present when a private entity exercises functions traditionally and ex-

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[2] *Amici* do not support the holding that members of the media should be considered government actors when they accompany law enforcement officials in these situations. However, *Amici* believe that if courts apply this standard to members of the media merely for coordinating coverage of a law enforcement event with officials, then the standard must be applied to citizens whose actions have a much greater nexus to government power so that they are considered government actors, such as petitioners in this case.

clusively reserved to the state.[3] *Id* at 514; *see also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (discussing the need for a close nexus between the state and the challenged action of the private party or regulated entity). Although the journalists in *Berger* were clearly not employed by the government, nor would they normally be assumed to be state actors, the Ninth Circuit made it clear that there was a sufficiently close nexus between the media and the government so that the media's private actions became public conduct.

Petitioners in this case meet the requirements for both of the above *Berger* tests to be considered government actors. There is a sufficiently close nexus between the government and petitioners so that petitioners' actions can be treated as those of the state; as discussed earlier, petitioners are taking over the role of state legislators to revoke legislation. Petitioners are also exercising functions traditionally and exclusively reserved to the state. Washington state officials and legislators are the only traditional parties that enact, revise, and revoke laws and regulations for the state, the only exception being when citizens invoke the referendum power. Under the "state actor" tests and *Berger*, petitioners are clearly behaving as government actors.

Courts have also found that governmental employees are not entitled to First Amendment protec-

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[3] There are two other tests named in *Berger*, but they are not relevant to this situation. A private actor does not need to meet all four tests to be considered a government actor; a court can select any of the tests that is most applicable to the situation. *See Berger*, 129 F.3d at 514.

tion when acting in their official capacity. In *Garcetti v. Ceballos*, the United States Supreme Court found that when a public employee made statements pursuant to his official duties, that employee was not speaking as a private citizen and therefore, that employee's speech was not protected by the First Amendment. 547 U.S. 410, 420, 426 (2006). Several other United States Courts of Appeals have followed suit, consistently finding that government employees speaking in the context of their employment may not be entitled to First Amendment protection. *See, e.g., Weintraub v. Board of Education*, 593 F.3d 196, 203-05 (2nd Cir. 2010) (holding that a public elementary school teacher's filing of a grievance was speech pursuant to the teacher's official duties and not speech as a citizen); *Nixon v. Houston*, 511 F.3d 494, 498 (5th Cir. 2007) (noting that the possibility of a First Amendment claim arises only after the court determines that an employee is not speaking in his/her role as an employee but rather as a citizen); *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (noting that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe upon any liberties" the employee has as a private citizen). Much like government employees whose speech is not protected under the First Amendment when carrying out their professional duties, citizens acting as legislators should not be entitled to the same First Amendment protections as private citizens.

C. Protecting official acts as speech serves only to enhance government secrecy and diminish accountability.

It is critical that this Court distinguish between speech that qualifies as core political speech and government actions that are masquerading as speech. Improper categorization of government actions as core political speech sets a dangerous precedent because it allows the government to act in secret. If the Court allows referendums to be placed on the ballot without disclosing the identities of the government actors/citizens who petitioned for the referendum, the general public has no way of holding the government accountable for the legislation. The United States government is founded upon a strong tradition of open government and accountability, yet petitioners are asking this Court to ignore this foundation and to promote government secrecy in enacting legislation.

Allowing government conduct to masquerade as private speech has far-reaching implications and is devastating to the public's right to evaluate its government. Insisting that government actions must all undergo First Amendment analysis jeopardizes regulations designed to promote government openness and accountability. For example, the U.S. Court of Appeals for the Fifth Circuit recently endangered these openness and accountability regulations by holding that state open meeting laws that prevented elected members of a city council from participating in closed meetings must be subject to strict scrutiny. *Rangra v. Brown*, 566 F.3d 515, 517-18 (5th Cir. 2009) (holding that the speech of elected officials was identical to private citizen speech; overturned on *en banc* review on mootness grounds). Following the Fifth Circuit's lead and holding that any official action involving speech or expression was subject to constitutional scrutiny would make it extremely easy

for state actors to hold closed-door meetings and refuse to disclose information and records, claiming that these actions were protected under the First Amendment. For example, a state actor could claim that financial disclosures are now protected speech under the First Amendment, and thereby prevent the public from learning information that is highly relevant to evaluating that state actor. Obviously, allowing the political process to operate in secret in this manner would have significant adverse effects on government accountability.

D. A threshold test is necessary before determining what level of scrutiny to apply.

As a threshold matter, the Court must first determine whether scrutiny of state action is even appropriate, before attempting to determine what level of scrutiny may apply. Many entities involved in this matter have skipped the threshold question and instantaneously assumed that referendum petitions are subject to a certain level of scrutiny. Although many parties are attempting to fit this particular government action into one of previously established categories described below, referendum petitions do not, in fact, meet the elements required for any of the established levels of scrutiny.

This Court has previously held that there are different levels of scrutiny that can be applied to different expressive actions. While core political speech and anonymous speech is generally subject to strict scrutiny, intermediate scrutiny is used for laws that either regulate speech in a content-neutral manner or laws that regulate non-speech conduct, but have

an incidental effect on expression. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186, 199 (1999) (discussing the application of the strict scrutiny test to core political speech); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (applying intermediate scrutiny analysis for content-neutral restrictions that imposed an incidental burden on speech); *United States v. O'Brien*, 391 U.S. 367, 376-82 (1968) (applying intermediate scrutiny to a regulation that had an incidental effect on expressive conduct); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (And What Do They Mean to the United States Supreme Court)?*, 30 Seton Hall L. Rev. 551, 552-53 (2000). When expressive conduct is at issue, courts will determine whether there is a sufficiently important governmental interest in regulating the non-speech element that justifies any incidental impact on First Amendment protections of speech. *O'Brien*, 391 U.S. at 376.

Referendum petitions do not fit into any of these established categories of speech and conduct, and in fact, do not even deserve intermediate scrutiny. As the Ninth Circuit found, this is not anonymous speech because the signatures on the petition were not gathered in confidence, and Washington law "makes no promise of confidentiality, either statutorily or otherwise." *John Doe #1 v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009). However, signing a referendum petition is not truly expressive conduct either, because expressive conduct always requires a balancing test to determine where there is a sufficiently important government interest that justifies the effect on First Amendment liberties. When referendum petitions are at issue, there will always be an exceed-

ingly strong government interest in keeping the legislative process open and the actors participating in that process accountable for their actions. That particular government interest will automatically be present whenever a referendum is used and there is no need to conduct an extensive balancing test to determine its existence.

Because referendum petitions do not meet any of the established categories, it is critical that this Court return to the initial inquiry of whether any scrutiny is even appropriate. In doing so, the courts should distinguish between restrictions on traditional speech and those restrictions that are actually meant to hold the government accountable to the people. True restrictions on an official's speech — regulating what topics they can comment on or what views they can express — would appropriately be subject to review under the *Garcetti* standard, and would be upheld or struck down, depending upon whether or not they met the elements under *Garcetti*. *Garcetti*, 547 U.S. at 420, 426. *Garcetti*, though, is inapplicable in this case because the proposed restriction on government disclosures implicates the ability of the people to govern, not just an individual official's employment status. In such a case, the court's next step is not to determine what level of constitutional scrutiny applies; it is instead to recognize that the "speech" that a government actor claims is restricted is not speech at all, but state action. Thus, there is no need for any further constitutional analysis to determine whether a level of scrutiny applies.

II. There is no justification for completing the referendum process in secret, particularly

when it denies citizens the opportunity to evaluate government.

A. It is inappropriate to treat the referendum process as being identical to the secret ballot or the right to vote.

Petitioners claim that the referendum process is identical to the right to vote. However, courts have already recognized that this is not the case. "[R]eferendums, unlike general elections for a representative form of government, are not constitutionally compelled." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). In *Taxpayers United*, the United States Court of Appeals for the Sixth Circuit carefully distinguished between the right to initiate legislation, which was a "wholly state-created right," and the right to vote, which is granted to United States citizens through the federal constitution. *Id.* at 296-97. Because the petitioners in *Taxpayers United* had "not been prohibited from exercising a fundamental constitutional right," the court found that signing a petition was not entitled to the same First Amendment protection as exercising the right to vote. *Id.* at 296-97. Therefore, the referendum process is not automatically entitled to the same protections as the voting process.

Additionally, the referendum process does not share the same unique history as the secret ballot. Although the right to vote is as old as the federal Constitution, the secret ballot was not universally adopted until the late Nineteenth and early Twentieth Century, after Massachusetts became the first state to adopt it. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot:*

Challenges for Election Reform, 36 U. Mich. J.L. Reform 483, 490 (2003). Reformation of the ballot system was brought about not because of a belief in a privacy right in voting, but a clear need to correct an election process rife with corruption and fraud. *See Burson v. Freeman*, 504 U.S. 191, 200-202 (1992). Prior to reform, voting ballots were distributed by the political parties, which created ballots with distinctive colors and designs to ensure that it would be easy to tell for which party an individual voted. *Id.*. at 200. As a result, parties could either confuse voters by imitating popular party ballots or corrupt voters by threatening them or bribing them to vote for a particular party. *Id.* at 201. Massachusetts' use of the secret ballot spurred a nationwide adoption of reform between 1888 and 1891. Jill Lepore, *Rock, Paper, Scissors*, THE NEW YORKER (Oct. 13, 2008).

The need to maximize administrative efficiency may have also helped drive ballot reform. *See* David L. Permut & Joseph P. Verdon, *Protecting the American Tradition of Write-In Voting After* Burdick v. Takushi, 9 J.L. & Pol. 185, 191-92 (1992). When the parties created their own ballots, the state was unable to ensure the integrity of the vote. *See* John C. Fortier, *The Absentee Ballot and the Secret Ballot*, at 490. There was no way to keep track of how many ballots there should be because the state did not created or distribute them, and ballots that varied vastly in color, size and organization and were made by either the party or the individual voter were burdensome for voters to create and administrators to count. *See Id.* at 489; Permut, *Protecting the American Tradition of Write-In Voting After* Burdick v. Takushi, at 191; *Burson*, 504 U.S. at 200, 203.

Petitioners emphasize the right to privacy in voting, but this focus is misplaced, given the secret ballot's history. The privacy concern was actually a secondary concern during the reform period, which focused primarily on the integrity of the voting process and the safety of the voters, instead of the individual right of privacy that is incidentally involved. *See Burson*, 504 U.S. at 200. In fact, before its adoption, many in the United States were vehemently opposed to a secret ballot, calling it cowardly and underhanded. Lepore, *Rock, Paper, Scissors*, at 3.

The history behind the secret ballot is instructive for the Court's ruling in this case. Contrary to petitioners' suggestions, the right to a secret ballot was not established because of a privacy right or an interest in anonymous voting. Rather, the secret ballot was created because of a primary need to eliminate corruption in the voting process.

Furthermore, petitioners claim that the right to vote is "inextricably tied" to a referendum petition, so a referendum petition must be given the same level of scrutiny. *Petitioners' Brief*, filed February 25, 2010, p. 20 ("Petitioners' Brief"); *see Campbell v. Buckley*, 203 F.3d 738, 742 (10th Cir. 2000) (noting that the right to vote cases are either subject to strict scrutiny or a balancing test). A citizen exercising the right to vote, however, is acting in a fundamentally different manner than a citizen who is exercising the right to legislate. A citizen casting a vote is only seeking to select officials that will later become responsible for creating and enacting legislation on a wide range of legislation. A citizen participating in a referendum is actively trying to govern on a specific

legislative initiative. These are two separate activities and should be treated as such.

B. Refusing to disclose signatories on a petition is an act of government secrecy and denies citizens the opportunity to evaluate the legislative process.

The primary purpose of Washington's Public Records Act is to promote open government and ensure that state actors are held accountable for their actions. The Public Records Act states that the "people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code. § 42.56.030 (2009). For the citizens of Washington, a key component of remaining informed and maintaining the right to legislate is knowledge of what organizations or individuals are exercising their rights as state actors and attempting to overturn or revise legislation. If these citizens are not allowed to discover the identity of state actors, the state government will operate in secret.

The United States District Court for the Eastern District of California has already recognized the importance of knowing the identity of parties involved in government. In *ProtectMarriage.com v. Bowen*, the court refused to uphold a First Amendment challenge to a California state statutory requirement that ballot committees disclose names and personal information, noting that "being able to evaluate who is doing the talking is of great importance" because of the "complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures." 599 F.Supp.2d 1197, 1208 (E.D. Cal. 2009). Although

ProtectMarriage.com focused on disclosure of individuals who provided monetary donations to a political cause, the same logic applies to referendum petitions. Washington citizens also must be able to evaluate the parties putting forth a petition for referendum so that they can understand where support for the referendum is coming from, much in the way that these same citizens can evaluate state actors who are elected to office.

III. Washington's Public Records Act does not violate the First Amendment or any constitutional right of privacy.

In cases involving political speech, the First Amendment is interpreted to prohibit government action that denies the right of the people to communicate their opinions and beliefs on political issues. Petitioners insist that the right of the petition signatories is a First Amendment violation; however, the simple fact that a political petition is involved does not automatically qualify Washington's Public Records Act's public disclosure provisions as a First Amendment violation. In analyzing political speech cases, this Court and others have focused on whether there are actual restrictions on an individual's or party's right to communicate, and whether there is any prohibition on interactive communication between parties and individuals. Nothing in Washington's Public Records Act prohibits petitioners' right to communicate.

A. Even if submitting a referendum petition could be constituted as core political speech, it does not violate the First Amendment because nothing in

Washington's Public Records Act is restricting or prohibiting interactive communication.

This Court, as well as multiple other federal courts, has examined whether a First Amendment claim can arise out of the circulation of petitions for referendums. Petitioners are quick to point to these cases as establishing precedent for this current matter, but this reliance is misplaced. Petition circulation cases are fundamentally different from referendums designed to overturn legislation. When an individual circulates a simple petition, he or she is attempting to communicate his or her opinion to others and gather information on others that may support that cause. When an individual signs a referendum petition, however, that individual is attempting to exercise the right of self-governance. There is a critical, explicit distinction "between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process." *Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996). Courts have continually focused on the interactive communication aspects of petition circulation, which is not present when citizens act as the government.

For example, the plaintiffs in *Molinari v. Bloomberg* also attempted to argue that their First Amendment rights were implicated in a referendum context when the city amended a local law previously enacted by a referendum. 564 F.3d 587, 590 (2009). The U. S. Court of Appeals for the Second Circuit quickly noted that the plaintiffs' claim was "not based upon any actual restrictions on their right to communicate with voters" because there was no "at-

tempt to regulate the circulation of initiative or referendum petitions." *Id.* at 601. The court ultimately found that the plaintiffs had failed to identify a burden on their First Amendment rights. *Id.* at 606. The Second Circuit's key focus in *Molinari* was on identifying any restriction on plaintiff's right to communicate with voters and whether the circulation of a referendum petition was at issue.

Likewise, this Court also addressed First Amendment restrictions on interactive communication in *Meyer v. Grant* and *Buckley v. American Constitutional Law Foundation, Inc.* In *Meyer*, the Court found that Colorado's prohibition against compensating circulators of petitions violated the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 414-15 (1988). In reaching that holding, this Court noted that "the circulation of a petition involves the type of *interactive communication* concerning political change that is appropriately described as core political speech." *Id.* At 421-22 (emphasis added). In *Buckley*, the Court held that Colorado's requirements that petition circulators be registered voters, wear an identification badge, and report the names and addresses of all circulators also violated the First Amendment. 525 U.S. at 183. The Court further noted that petition circulation was core political speech specifically "*because* it involves 'interactive communication concerning political change.'" *Id.* at 186-87 (emphasis added). Again, the critical component in *Meyer* and *Buckley* was the interactive communication aspect of actual petition circulation — that is what the First Amendment and the courts are protecting.

Interactive communication was also the type of speech at issue in *McIntyre v. Ohio Elections Commission*, where this Court held that a statutory prohibition against distribution of anonymous campaign literature violated the First Amendment. 514 U.S. 334, 334-35 (1995). Even though the campaign literature was anonymous, the focus of the Court was still on the interactive communicative aspect of the literature, framing the issue as one of determining whether the First Amendment's protection "encompasses documents intended to influence the electoral process." *Id.* at 344. Additionally, the petitioner in *McIntyre* sought only to inform voters about a controversial viewpoint and political opinion; the petitioner was not actually involved in enacting or revoking regulations, legislation, or laws.

Finally, the court in *Taxpayers United*, where plaintiffs' claimed that their First Amendment rights had been violated through Michigan's referendum procedures, also noted the difference between interactive communication and legislative action:

> The Michigan procedure does nothing more than impose nondiscriminatory, content-neutral restrictions on the plaintiffs' ability to use the initiative procedure that serves Michigan's interest in maintaining the integrity of its initiative process. Our result would be different if, as in *Meyer*, the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation, or if they alleged they were being treated differently than other groups seeking to initiate legislation.

Taxpayers United, 994 F.2d at 297.

There is no interactive communication at issue in this matter; therefore, petitioners' First Amendment claim is without merit.[4] Petitioners claim that a referendum automatically falls into the same category as petition circulation, but citizens act in a fundamentally different capacity when distributing political literature than when they submit a referendum. A citizen who distributes political pamphlets is only passively participating in government — he or she is informing others about his or her opinion on a political issue. A citizen participating in a referendum has moved beyond interactive communication to taking an active role in government by attempting to overturn legislation that was enacted by elected officials.

Washington's Public Records Act does not attempt to regulate the interactive exchange of ideas about political issues. Petitioners are free to circulate petitions, gather signatures, and speak to whomever they would like without restrictions. The only process that Washington seeks to regulate is the general referendum process.

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[4] At least one court has refused to permit the disclosure of names in a referendum context. In *Campaign for Family Farms v. Glickman*, the United States Court of Appeals for the Eighth Circuit held that the United States Department of Agriculture could not release the names and addresses of persons signing a petition seeking a referendum abolishing mandatory checkoff program. 200 F.3d 1180, 1189 (8th Cir. 2000). That case differs from the current one in several aspects however. First, the court was focusing on the personal privacy exemption under the Freedom of Information Act, which is not applicable here. Secondly, the issue was only relevant to pork producers who had signed the petition in "their business or entrepreneurial capacities," which is also not applicable here. *Id.* at 1188-89.

Petitioners also argue that individuals will be less likely to participate in the referendum process. But courts have found that legislative or constitutional provisions that may make people less likely to participate in the political process are not necessarily unconstitutional. In *Initiative and Referendum Inst. v. Walker*, where plaintiffs challenged a constitutional provision requiring a supermajority for passing wildlife initiatives, the U.S. Court of Appeals for the Tenth Circuit upheld the provision because, although it discouraged some speakers from engaging in protected speech, it did not actually prevent such speech. 450 F.3d 1082, 1100, 1105 (10th Cir. 2006). Although individuals may be discouraged from signing petitions if their names are released to the public, nothing in Washington's PRA actually prevents speech.

B. Washington's Public Records Act does not implicate constitutional privacy interests.

Petitioners repeatedly emphasize the constitutional right to privacy; however this emphasis is completely misplaced. *Petitioners Brief*, pp. 26-29. This Court has recognized a constitutional right to privacy in specific, limited areas involving an individual's private activity. The focus has always been on preventing government interference in an individual's personal sphere. Initiation of laws that govern all Washington residents is clearly not a private activity that affects only an individual's personal sphere; in fact, it is one of the most public activities that exists. Petitioners fail to draw that distinction.

Protection against government intervention in an individual's personal sphere was illuminated in *Griswold v. Connecticut*, where this Court held that the Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy. 381 U.S. 479, 486 (1965). Specifically, this Court discussed the Fourth and Fifth Amendments, which give "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" *Id.* at 484. This Court also specifically noted the "zone of privacy created by several fundamental constitutional guarantees," but these constitutional guarantees relate to the right to privacy in an individual's personal sphere, not an individual's public activities. *Id.* at 485.

Petitioners also rely heavily upon *NAACP v. Alabama* as providing a "privacy" right in associations, but this analysis is again incorrect. *Petitioners' Brief*, pp.26-27. *NAACP* focuses on individual's activities within their private sphere, not individual activities in the public sphere. *NAACP v. Alabama*, 357 U.S. 449, 463-4 (1958). Other courts also focus on the right to privacy in a person's personal, private activities. *See Dible v. Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (court noted that "the First Amendment does encompass a right of privacy, whose contours include within it a right to make personal decisions and a right to keep personal matters private"); *Crawford v. United States Trustee*, 194 F.3d 954, 958 (9th Cir. 1999) (court noted that U.S. Supreme Court cases delineated constitutionally protected privacy interests into two categories: the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions). Additionally, any right to pri-

vacy that petitioners claim regarding their personal activities and beliefs disappears when they voluntarily disclose information on those activities to the public. *See Dible*, 515 F.3d at 918 (court noted that plaintiff's right to privacy claims were "virtually oxymorons" when plaintiffs made their personal activities public). Extending this right of privacy in the personal sphere to encompass a right of privacy in the public sphere, particularly in the legislative context, both misapplies precedent and denies citizens the right to know who is enacting and revoking laws that they must live under.

Furthermore, petitioners in *NAACP* were concerned with protecting the privacy rights of members who were "rank-and-file members," not official leaders of the organization. 357 U.S. 449, 463-64 (1958) (court noted that petitioner had not "objected to divulging the identity of its members who are employed by or hold official positions" with the organization); *see also Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 185 (court noted that ruling in *NAACP* applied to rank-and-file members). Petitioners in this case have much more in common with the official leaders of NAACP, who did not attempt to have their names withheld from public disclosure, because petitioners are not simply trying to exercise their right to associate — they are exercising their right to legislate. Therefore, they should not be accorded the same associational privacy rights that were granted to the rank-and-file members in *NAACP*.

CONCLUSION

In sum, petitioners claim that referendum petitions are protected under the First Amendment is without merit. Citizens submitting referendum petitions are acting as legislators, not as private citizens, and should be subjected to a threshold inquiry of whether legislative action truly constitutes speech. Petitioners have not been denied any rights to interactive communication under the First Amendment, nor do they have any constitutional privacy interests. This Court should find in favor of respondents.

Respectfully submitted,

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APPENDIX A

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The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 84 daily newspapers in the United States, including USA TODAY and The Indianapolis Star, and nearly 850 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and over 100 U.S. websites that are integrated with its publishing and broadcast operations.

Established in 1885, the National Newspaper Association (NNA) is the national voice of community newspapers. NNA represents owners, publishers, and editors of America's community newspapers and has over 2000 members. Most of its members are weekly or small daily newspapers, owned by families or small ownership groups. The mission of NNA is to protect, promote and enhance America's community newspapers. NNA is a 501(c)(6) non-profit trade association with no subsidiaries. NNA is headquartered in Columbia, Missouri.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States

and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Radio Television Digital News Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

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AMICUS CURIAE BRIEF

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v.

SAM REED, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* VOTERS WANT MORE CHOICES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* VOTERS WANT MORE CHOICES IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Voters Want More Choices is a grassroots taxpayer-protection organization, committed to safeguarding individual rights and fostering government accountability through the exercise of the freedoms of speech and association protected by the First Amendment.

[1] Pursuant to this Court's Rules, all parties consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Counsel for all parties received 10 days notice.

Voters Want More Choices attempts to protect the rights of individuals by limiting the power of the legislature by promoting the use of signature drives, signed petitions and ballot referenda. Sponsoring and signing petitions thus represents the purest form of political speech for the supporters of Voters Want More Choices and, in attempting to attract like-minded supporters, implicates freedom of association. These interests are magnified by the commitment of many supporters of Voters Want More Choices to the political and social positions at which their petitions are directed.

The interest of Voters Want More Choices is not a theoretical abstraction. The record in the instant case demonstrates that citizens of the kind that support it have been subject to intimidation and threats of physical violence often directed by anonymous callers or Internet website posters who have obtained the names and other information of these victims as a result of their having signed petitions. Especially because there is no law enforcement requirement or demonstrable public necessity for the release of these badges of identity, Voters Want More Choices seeks to assist this Court in assuring that the citizens of the State of Washington, and elsewhere, can continue to express themselves without the fear of harassment and retribution.

SUMMARY OF ARGUMENT

The First Amendment prohibits Congress from making laws that abridge the freedom of speech or the right of the people peaceably to assemble.[2] Under the Due Process Clause of the Fourteenth Amendment these protections apply to the States. *See*

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[2] U.S. Const. amend. I.

DeJonge v. Oregon, 299 U.S. 353, 364 (1937); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Thus, every citizen enjoys protection to speak and act peaceably to express his or her views across the spectrum of issues that are the subject of public debate and governmental consideration. The methods of such expression are widely varied. Some people might stand on soapboxes in the public square or, today, use electronic equivalents. Others might write editorial pieces or take out newspaper advertisements. Still others, and this is where the interest of Voters Want More Choices comes in, believe that the best way to vent public issues is by signing petitions that lead to referenda and initiatives that force or block legislative action.

However different from one another they might be, all of these avenues represent political speech, and affecting such speech implicates freedom of association as like-minded people join in particular political endeavors. *See Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Going to the core of democracy, these rights might be abridged only if the government can satisfy the strict scrutiny standard by showing a compelling interest. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). In the instant case, the State government's publicizing the names of individuals who have signed political petitions, without any demonstrable law-enforcement need or private right of enforcement, needlessly chills speech and free association and so cannot pass First Amendment muster.

At least as long ago as its decision in *NAACP v. Alabama*, this Court has protected the anonymity of the membership lists of political groups because the security of their identities is "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *NAACP v. Alabama*, 357 U.S. 449, 466 (1958); *see also NAACP v. Button*, 371 U.S. 415 (1963). Such people associate for the purpose of speaking politically both with the force and the protective anonymity that a group provides. *See N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). The reason to protect the identities of the signers of political petitions is the same as it was in *NAACP v. Alabama*, *i.e.*, to avoid harassment and retaliation. And, similarly, there is no demonstrable public necessity for disclosure. Unless this Court holds for Petitioner, the supporters of Voters Want More Choices will, under threat of retaliation for the expression of their political views, find that their right to free speech and peaceable association will have been arbitrarily trammeled.

ARGUMENT

In a manner analogous to the disclosure forbidden by this Court in *NAACP v. Alabama*, *supra*, the instant matter presents a legal challenge to a state's acting to release and publicize the identities and related information of individual private citizens who are participating in legitimate public and political activities. *See NAACP v. Button*, *supra*. The court of appeals erroneously held that the First Amendment does not protect an individual's name from being released because other signors of the petition might see the individual's name and because government

officials also could verify the individual's identity. However, these conclusions are logically faulty. The fact that *supporters* of a given petition signatory might see a name is inconsequential. It is *opponents* that constitute the concern. And, while state authorities are free to verify the accuracy of a signatory's information, there is no need for outsiders to participate in the mandated process and hence no compelling interest, indeed no interest at all, in the State of Washington's threatened abridgement of the right of its citizens to speak and to associate freely.

I. WHEN INDIVIDUALS SIGN A PETITION, THEY ARE ENGAGING IN POLITICAL SPEECH AND ASSOCIATION THAT IS PROTECTED UNDER THE FIRST AMENDMENT.

There can be no question that the issue that undergirds Petitioner's complaint—whether the State of Washington should redefine marriage to include unions of persons of the same sex—is both publicly significant and appropriate for consideration and debate in the public forum. Nor, under the law of Washington is there any question that it is appropriate for citizens to attempt, by executing petitions, to affect political outcomes by mandating ballot initiatives and referenda.

There should not be any dispute that signing a petition constitutes political speech and that organizing groups of people to sign petitions constitutes political association. Indeed, the manifestation of speech is two-fold. First, organizers and signatories are expressing a desire to compel immediate political action, that is to get an issue placed on a public ballot that, if successful, will lead to or prevent legislative action. Subordinately, organizers and signatories are

taking an initial step in expressing themselves on the ultimate merits of the issue that is the subject of their procedurally-oriented initial expression. Whatever other characterization or purpose that anyone wishes to assign to the endeavor, it clearly constitutes speech intended to secure political change. *See NAACP v. Button*, *supra*.

In *NAACP v. Alabama*, this Court held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association . . . inviolability of privacy in group association may in many circumstances be indispensable to preservation of the freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, *supra*, at 462. While much has changed in this country since then, especially concerning issues related to race, we still live in a charged political climate, and issues like reproductive rights, quota-based affirmative action and, as in this case, same-sex marriage are issues of vital concern and, to zealots on the fringes of both sides of such issues, retaliation and harassment still represent tactics of choice. In the Internet age, verbal harassment has taken on a new form when the identity of an individual can instantaneously be transmitted across the world and, through social media and other vehicles, further information can be acquired that ends up subjecting political actors to pressures in the community and on the job that might dissuade all but the most committed from entering the public fray.

It does not tax the imagination to conclude that the widespread dissemination of personal information, untethered to any legitimate public purpose could result in the construction of "enemies lists" and other

forms of directed harassment. The record in this case at least demonstrates that such fears are not hypothetical.

The rights to speak and associate, sometimes in secret, are not just guaranteed to members of formal civil rights organizations but to anyone who wishes to avail himself or herself of the "freedom to engage in association for the advancement of beliefs and ideas [that] is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, *supra*, at 460; *see Tashjian v. Republican Party*, *supra*, at 214; *NAACP v. Button*, *supra*, at 430; *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960). Additionally, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *NAACP v. Alabama*, *supra*, at 466.

In the case at bar, the speech and association in question relates to political and, some argue, religious matters. The collection of signatures to advance views on such issues is, under this Court's precedents, core political speech. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186 (1999).

As in this Court's earlier precedents, the publication of a list of the individuals who signed petitions in Washington State would be subjected to "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *NAACP v. Alabama*, *supra*, at 462. Similarly, Petitioner has established "an uncontroverted showing that on past occasions revelation of the identity of its . . . members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations

of public hostility." *Id.* Thus, the "compelled disclosure of . . . membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP v. Alabama*, *supra*, at 462-63. Just such a showing has been made here. Citizen activists who are members and supporters of Petitioner (and this *Amicus*) have declared that they will no longer associate with the group, or express themselves, due to fear of repercussions from the publication of their information, even to the point of fearing to attend church services or leave their homes because of threats made against them.[3]

The persons whose identities most often require protection as they engage in political activities are those who espouse unpopular causes, as is the case here in certain politically correct quarters. Thus, this Court has held that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."" *Brown, et al. v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91(1982) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *NAACP v.*

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[3] These facts are listed in the Verified Complaint for Declaratory and Injunctive Relief. (Joint Appendix 9.)

Alabama, *supra*, at 462.) That is just the case for organizations like *Amicus*, that would have no reason for existing if persons could not associate with it and join in its petition writing efforts.

As in this Court's early civil rights precedents, petition signers, especially those supporting controversial causes likely to engender problematic responses by opponents, require the utmost First Amendment protection. *See Citizens United v. FEC*, No. 08-205, slip op. at 54 (S. Ct. Jan. 21, 2010); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). If the State of Washington publishes the individual petition-signer information, those persons will end up on "enemies lists." They will be harassed in their workplaces and homes. Indeed, it is entirely possible using modern technology to create lists not just showing "enemies" but to link their names with easily found addresses, Internet Uniform Resource Locators, and even maps and driving directions to their homes. In other words, these individuals could be persecuted for their beliefs anywhere they could be found.

II. STATE ACTION THAT "CHILLS" FREE SPEECH AND THE FREEDOM TO ASSOCIATE IS SUBJECT TO STRICT SCRUTINY.

A. There Is No Compelling Interest That Would Support Disclosure.

The First and Fourteenth Amendments do not prohibit all State actions that limit free speech. However, "[i]n the domain of the indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

NAACP v. Alabama, *supra*, at 461. Specifically, "[t]he right to privacy in one's political associations and beliefs will yield only to a "'subordinating interest of the state [that is] compelling,'" and then only if there is a "substantial relation between the information sought and an overriding and compelling state interest.'" *Brown v. Socialist Workers '74 Campaign Comm.*, *supra*, at 91 (citing *NAACP v. Alabama*, *supra*, at 463; *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963)). In other words, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny," *NAACP v. Alabama*, *supra*, at 460, and any burden on these rights must be narrowly tailored to serve compelling government interests. *Buckley v. American Constitutional Law Found.*, *supra*, at 192.

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). *See Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981); *NAACP v. Button*, *supra*. As we have discussed earlier, the activities of Petitioner and others like it represent core political speech in two manifestations: an expression that a particular issue belongs on the State ballot; and an expression as to the ultimate merits of the issue. Under the reasoning of cases like *McIntyre* and *Buckley*, the act of collecting signatures is core political speech, which cannot be burdened, if at all, unless that State has narrowly tailored its conduct to serve a compelling State interest.

The State admittedly has an interest in preventing fraud in election and petition matters. Accordingly,

State enforcement authorities have access to petitions and the identities of their signatories. However, the State has no need to publish this information. Indeed, the Washington State legislature has recognized this by having created an enforcement mechanism that is entirely internal to government (unless, of course, a violation is determined and public action on it is required). In other words, the public has no role at all in investigating or assessing violations and no public right of action that would require its knowledge of the identity of petition signatories.

As the Supreme Court explained in *Buckley v. American Constitutional Law Found.*, *supra*, "ballot initiatives do not involve the risk of 'quid pro quo' corruption" and "[t]he risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Buckley v. American Constitutional Law Foundation*, *supra*, at 203 (quoting *Meyer v. Grant*, 486 U.S. 414, 427 (1988)); *see also Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000).

As in *Washington Initiatives*, the State's interest in enforcement has nothing to do with the disclosure of the petition signatories' identities. In short, not only is there no compelling interest in disclosure, there is no interest at all.

B. The State's Obligation Not To Disclose Is Highlighted By The Analogous Fact That Its Citizens Are Entitled To Vote By Secret Ballot.

Article 6, Section 6 of the Washington State Constitution provides that, "[t]he legislature shall provide for such method of voting as will secure to every elec-

tor absolute secrecy in preparing and depositing his ballot."[4] According to the governing State law case, *State ex rel. Empire Voting Mach. Co. v. Carroll*, "[t]he object of all constitutional provisions and laws providing for a vote by ballot is primarily to procure secrecy, and this the legislature is admonished to do." *State ex rel. Empire Voting Mach. Co. v. Carroll*. 78 Wash. 83, 85 (1914). That holding parallels this Court's recognition that there is a "widespread and time-tested consensus" that secret ballots are necessary to protect voters from intimidation and harassment. *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

At least one federal court, the United States Court of Appeals for the Eighth Circuit, has equated the denial of a release of the identities of the signers of a petition calling for a referendum to terminate a federally-imposed assessment on certain agricultural sales with protection of their rights to a secret ballot. In holding that these disclosures could not be made under the Freedom of Information Act, the court opined that "[t]o make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners' privacy interest in a secret ballot." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187 (2000). Additionally, the Court also noted that "there is a strong and clearly established privacy interest in a secret ballot and that this privacy interest is no less compelling in the context of FOIA's personal privacy exemption than it is in other contexts. We also believe that in the circumstances of this case the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a clear declaration of how

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[4] Wash. Const. art. VI, § 6.

the petitioners intend to vote in the referendum, would substantially invade that privacy interest." *Id.* at 1188.

The court went on to note, "[t]hough many people signed the petition forms, each with space for ten signatures, and thus probably realized that a few individuals signing afterwards would be able to see their names, in so doing they did not waive their privacy interests under FOIA. Although an individual's expectation of confidentiality is relevant to analysis of the privacy exemption, here the petitioners would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum." *Id.* at 1188 (citation omitted). The court should not forget that "[t]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *United States DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 770 (1989) (citations omitted). Finally, the Eighth Circuit held that "the substantial privacy interest in a secret ballot . . . overrides whatever public interest there may be in oversight of the verification process." *Campaign for Family Farms, supra*, at 1189.

In the instant case, this Court need not decide an issue that has not been presented to it, *i.e.*, whether the initiative petitions signed by Petitioner's members and others are the functional equivalent of a secret ballot. Instead, *Amicus* simply urges the Court to recognize that secrecy of the identities of persons participating in the political process, where there is, as is the case here, danger of undue influence or reprisal, is something that both furthers the impartial administration of government and the

protection of the governed. Moreover, it is incumbent upon the State to resist disclosure under such circumstances and that arguments concerning partial disclosures to allied persons or enforcement interests that do not admit of public participation are, as the Eighth Circuit held, irrelevancies.

Thus, to the extent that there is a compelling State interest in anything, it is in non-disclosure of the identities of petition signatories, not in disclosure.

CONCLUSION

For the foregoing reasons, *Amicus* Voters Want More Choices respectfully submits that the judgment of the Ninth Circuit should be reversed and that this Court hold for Petitioner that the First and Fourteenth Amendments preclude the State of Washington from publicly disclosing the identity of individuals who sign petitions relating to, *inter alia*, initiatives and referenda.

Respectfully submitted,

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